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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 885

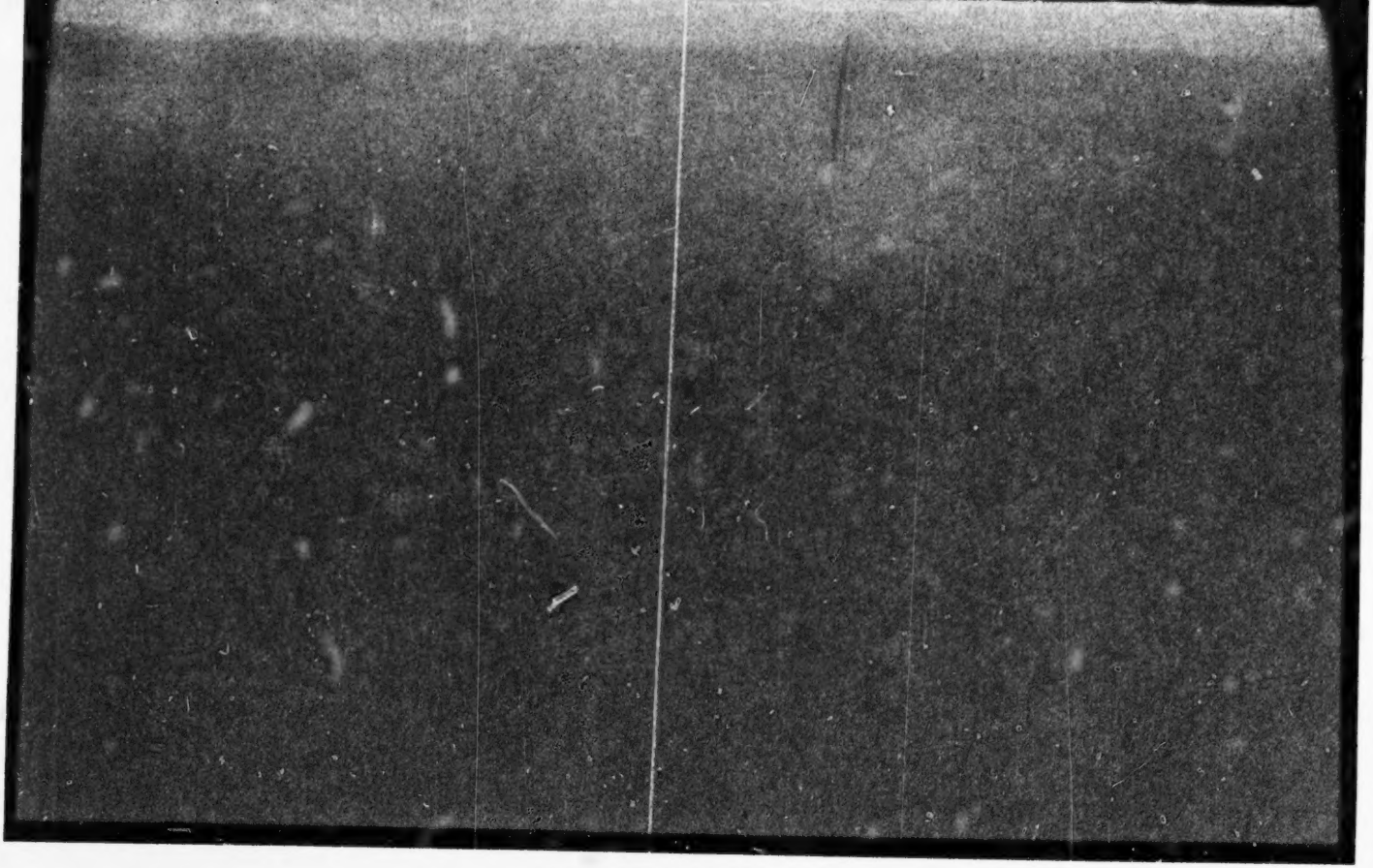
HARRY A. WOODRING, SECRETARY OF WAR AND H. A. A. SMITH, GENERAL PURCHASING OFFICER AND CHIEF OF WASHINGTON OFFICE, PANAMA CANAL, PETITIONERS

vs.

JUSTUS B. WARDELL, RECEIVER DISTRICT NATIONAL BANK OF WASHINGTON, D. C.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED JANUARY 31, 1940
CERTIORARI GRANTED MARCH 18, 1940



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 628

HARRY A. WOODRING, SECRETARY OF WAR, AND H. A. A. SMITH, GENERAL PURCHASING OFFICER AND CHIEF OF WASHINGTON OFFICE, PANAMA CANAL, PETITIONERS

VS.

JUSTUS B. WARDELL, RECEIVER, DISTRICT NATIONAL BANK OF WASHINGTON, D. C.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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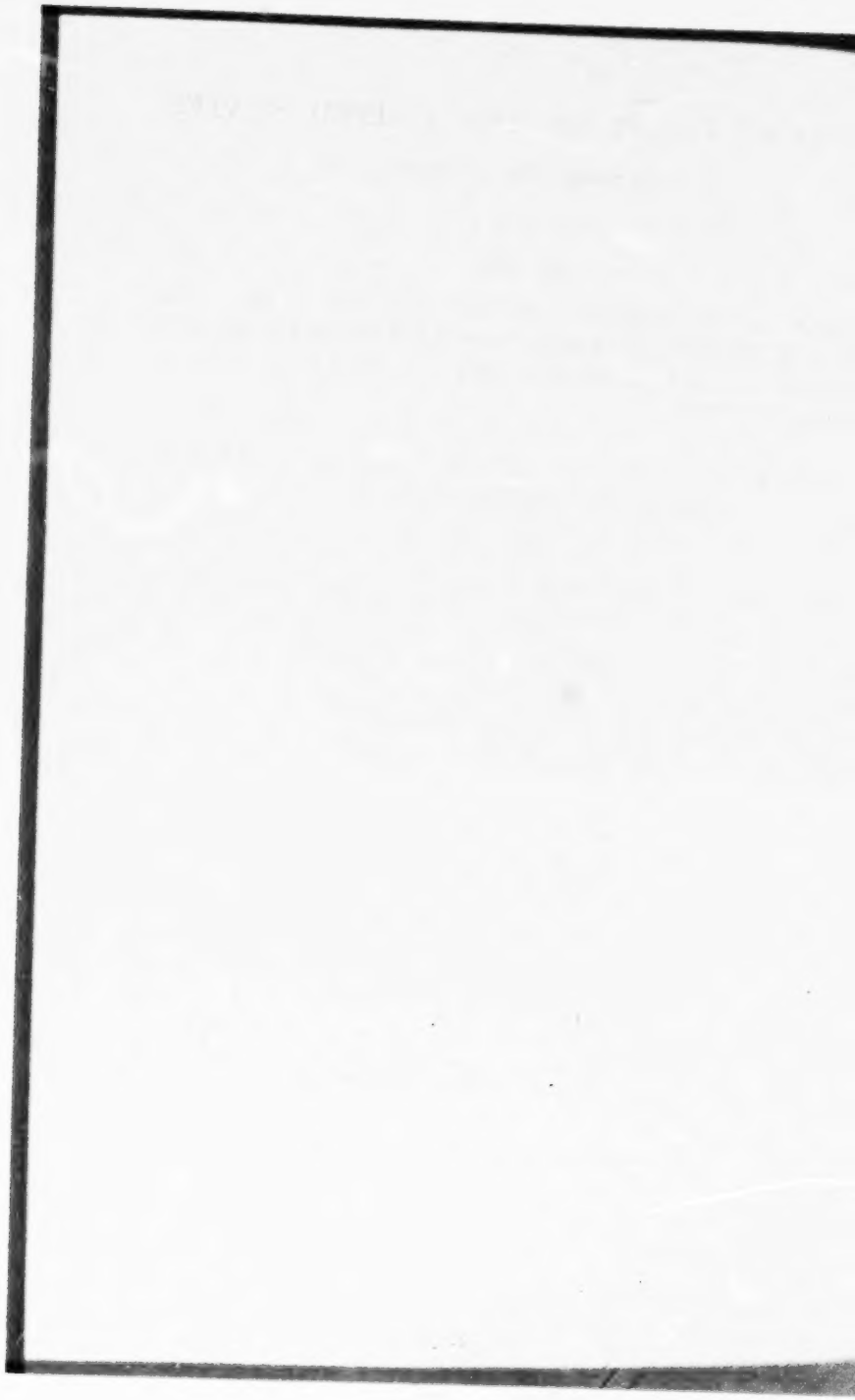

A In the District Court of the United States for the District of Columbia

No. 59007. In Equity

NORMAN R. HAMILTON, RECEIVER, DISTRICT NATIONAL BANK OF WASHINGTON, D. C., A CORPORATION, PLAINTIFF

vs.

GEORGE H. DERN, SECRETARY OF WAR, ARTHUR L. FLINT, GENERAL PURCHASING OFFICER, AND CHIEF OF WASHINGTON OFFICE, THE PANAMA CANAL, CREED FULTON COX, CHIEF OF BUREAU OF INSULAR AFFAIRS, WAR DEPARTMENT, C. F. BROWN, DISBURSING AGENT, PHILIPPINE REVENUE, BUREAU OF INSULAR AFFAIRS, WAR DEPARTMENT, DEFENDANTS

UNITED STATES OF AMERICA,
District of Columbia, ss:

BE IT REMEMBERED, That in the District Court of the United States for the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1

Amended bill of complaint

Filed June 4, 1936

In the Supreme Court of the District of Columbia

Holding an Equity Court

Equity 59007

NORMAN R. HAMILTON, RECEIVER, DISTRICT NATIONAL BANK OF WASHINGTON, D. C., A CORPORATION, PLAINTIFF

vs.

GEORGE H. DERN, SECRETARY OF WAR, ET AL, DEFENDANTS

The amended bill of complaint of the plaintiff filed with leave of Court first had and obtained, represents to this Honorable Court as follows:

1. The plaintiff is a citizen of the United States, temporarily residing in the District of Columbia, and brings this suit as the duly appointed and qualified Receiver of the District National Bank of Washington, D. C., a national banking association organized under the laws of the United States, formerly having its place of business and conducting its operations in the District of Columbia, and as more fully hereinafter shown.

2. The defendant, George H. Dern, is a citizen of the United States temporarily residing in the District of Columbia. Said defendant is Secretary of War of the United States and is sued as such in his official capacity incident to the performance of his duties with reference to the Canal Zone Territory on the Isthmus of Panama, and also incident

to the performance of his duties on behalf of the Government of the Philippine Islands, all as more fully hereinafter set forth.

2 3. The defendant, Arthur L. Flint, is a citizen of the United States and a resident of the District of Columbia, and is sued in his official capacity as General Purchasing Officer and Chief of Washington Office, The Panama Canal, as more fully hereinafter shown.

4. The defendant, Creed Fulton Cox, is a citizen of the United States and a resident of the District of Columbia, and is sued as Chief of the Bureau of Insular Affairs, War Department, as more fully hereinafter shown.

5. The defendant, C. F. Brown, is a citizen of the United States and a resident of the District of Columbia, and is sued as Disbursing Agent, Philippine Revenue, Bureau of Insular Affairs, War Department, as is hereinafter shown.

5 (a). The defendant, Henry Morgenthau, Jr., is a citizen of the United States, temporarily residing in the District of Columbia, and is sued as the custodian of certain funds claimed by plaintiff as assets of the District National Bank of Washington, representing the proceeds of certain bonds and certain other moneys paid under mistake of law to George H. Dern and Creed Fulton Cox and transmitted by them to The Chase National Bank of the City of New York and thereafter transmitted by said Chase National Bank to said defendant Henry Morgenthau, Jr.

5 (b). The defendants, and each of them, are sued in both their individual and official capacities.

6. The District National Bank of Washington, D. C., on, to-wit, March 5, 1933, was closed by Proclamation of the President of the United States and never thereafter reopened and was found and determined to be insolvent by the Comptroller of the Currency of the United States, who appointed a conservator on March 14, 1933, and thereafter, on November 6, 1933, plaintiff Norman R. Hamilton, was appointed Receiver of said bank and qualified as such and since such appointment and qualification has been, and now

3 is, the Receiver of said bank acting in such capacity.

7. The plaintiff avers that by virtue of an Act of Congress of June 28, 1902 (described as the Spooner Act, Pub. No. 183, 32 Stat. 483), and by virtue of an Act of Congress of April 28, 1904 (Pub. No. 190, Chapter 1758, Page 429, 58th Congress, Second Session), and by virtue of an Executive Order and letter to the President of the United States, dated May 9, 1904, the Canal Zone Territory was placed under the supervision and direction of the Secretary of War, and the then Secretary of War did, on the 18th day of August, 1914, open a deposit account in said bank designated under the caption "Secretary of War, Canal Zone Funds, Call Account", in accordance with a certain contract entered into by the then Secretary of War and the District National Bank, a copy of which is hereto annexed and marked Exhibit "A" and made a part hereof by this reference; that at the date of closing of said District National Bank the credit balance on deposit in said account amounted to the sum of, to wit, $200,000.00.

Plaintiff further avers that the then Secretary of War did on the 18th day of August, 1914, open a further deposit account in said

bank designated by the caption "Secretary of War, Canal Zone Funds, Checking Account" in accordance with the said contract entered into by the then Secretary of War and the District National Bank, marked Exhibit "A", hereto attached, and made a part hereof as aforesaid; that at the date of closing of said District National Bank the credit balance on deposit in said account amounted to the sum of, to-wit, $14,739.80.

That under and by virtue of the terms of the aforesaid contract, said District National Bank did, from time to time, unlawfully and illegally pledge to and deposit with the then Secretary of War, by the delivery to his subordinate officer, the then General Purchasing Officer of the Panama Canal, certain of said
4 bank's assets consisting of certain bonds of the aggregate par value of $274,200.00, same being more fully described and set forth in the Appendix hereto attached marked Exhibit "B", and made a part hereof by this reference. That as heretofore averred, said pledge of assets by said bank was without authority of law and hence the then Secretary of War was without authority of law to receive and accept said assets so pledged as collateral security for said deposit account, or in any capacity other than in trust for said bank, and accordingly the then Secretary of War received said collateral in trust for said bank, and at the date of closing of said bank, and thereafter, said bonds were held in trust by defendant George H. Dern, Secretary of War, as Successor in interest to his predecessor to whom said bonds had been pledged as aforesaid.

That thereafter, to-wit, on September 24, 1933, the bonds described in Exhibit "B" hereof were sold to the Hamilton National Bank, of Washington, D. C., under an agreement and arrangement by the defendants, the Secretary of War, and the then General Purchasing Officer of the Panama Canal, with the then conservator of the District National Bank, whereby the Secretary of War was illegally paid, under a mistake of law, from the proceeds of the sale of said bonds, the sum of $214,739.80, said sum amounting to the credit balance on deposit in the two accounts of Canal Zone funds deposited by the Secretary of War, as hereinbefore described, when said District National Bank closed, and an additional sum amounting to $3,535.37 representing alleged accrued interest upon said deposit balances to and including September 24, 1933, said above described sums being paid to the Secretary of War and the General Purchasing Officer of the Panama Canal by the setting up of a new deposit account in the Hamilton National Bank of Washington, D. C., in the name of the Secretary of War Canal Zone Funds.

5 Plaintiff avers that said proceeds of the sale of said bonds so paid to the defendants, the Secretary of War and the General Purchasing Officer of the Panama Canal thereupon became a trust fund for the benefit of the depositors, creditors, and stockholders of said District National Bank and, as such, are recoverable by plaintiff from said Secretary of War and said General Purchasing Officer of the Panama Canal, together with interest on said sums of $214,739.80 and $3,535.37 at the legal rate from September 24, 1933, the date of said illegal payment, to the date of reimbursement or repayment of said sum to plaintiff as a trust fund for the benefit of the depositors and other creditors and stockholders of said District

National Bank, subject to such adjustments and deductions as said Secretary of War and said General Purchasing Officer of the Panama Canal may be entitled to receive by reason of a 5% distribution to all depositors and creditors of the District National Bank, of the amount of their balances or claims on March 1, 1933, and the further distribution of 50% on the amount of the provable claims of the depositors and other creditors of the District National Bank as allotted by the conservator thereof, and paid on September 24, 1933.

8. That Section 625 of the Revised Administrative Code of 1917 of the Philippine Islands authorized the Secretary of War to designate a depositary bank in the United States for the deposit of funds of the Government of the Philippine Islands, upon the placing by the depositary bank with the Bureau of Insular Affairs, of the War Department, of bonds of the United States satisfactory to and approved by the Secretary of War. That as of November 11, 1932, the then Secretary of War, purporting to act under authority of the aforesaid statute, designated said District National Bank as such depositary of moneys of the Government of the Philippine Islands

6 and approved, as Secretary of War, a bond given by said District National Bank to the then Government of the Philippine Islands providing for and covering the deposit of funds of the Government of the Philippine Islands in said District National Bank, a copy of said bond being hereto annexed, marked Exhibit "C", and made a part hereof by this reference. That under said contract deposits were made from time to time in said bank and were duly credited to an account captioned "Treasurer of Philippine Islands Gold Standard Fund Account," and at the date of closing of said District National Bank the credit balance on deposit in said account amounted to, to wit, $751,801.40.

That purporting to act under the authority of the aforesaid statute, the said District National Bank without authority of law pledged, and the then Secretary of War, through and by the then Chief of the Bureau of Insular Affairs of the War Department, under the supervision and direction of the Secretary of War, accepted certain assets of the District National Bank as collateral security for the payment of such amount as might be due under said deposit account; that at the date of closing of said District National Bank the Secretary of War, through and by the then Chief of the Bureau of Insular Affairs, held, as pledgee to secure said deposit account, certain of the assets of said District National Bank, consisting of certain bonds of the par value of $750,000.00, the same being more fully described and set forth in Exhibit "D" attached hereto and made a part hereof by this reference.

That on, to wit, August 11, 1933, said bonds (or others substituted in lieu thereof) were sold by defendant George H. Dern, Secretary of War, acting through and by the then Chief of the Bureau of Insular Affairs of the War Department, for the sum of, to wit, $770,721.27, a schedule of the bonds so sold, and the price obtained therefor, being more fully set forth in Exhibit "E" hereto attached and made a part hereof by this reference.

7 Plaintiff avers that the aforesaid Section 625 of the Revised Administrative Code of 1917 of the Philippine Islands did not constitute authority in law for the pledge by said District National

Bank of its aforesaid assets to the Secretary of War and to the Chief of the Bureau of Insular Affairs, and no authority otherwise existed in law for said pledge of assets by said District National Bank. Plaintiff therefore avers that said assets so pledged (or others substituted in lieu thereof) were received by the then Secretary of War, acting through and by the then Chief of the Bureau of Insular Affairs, and were subsequently acquired by their successors in office, including defendant George H. Dern, Secretary of War, and defendant Creed Fulton Cox, Chief of Bureau of Insular Affairs, subject to a trust in favor of said District National Bank, its depositors and creditors and stockholders. Plaintiff further avers that said trust continued and attached to the said bonds (or others substituted in lieu thereof) and to the proceeds of the sale of same as aforesaid, and defendant George H. Dern as Secretary of War, and defendant Creed Fulton Cox, as Chief of Bureau of Insular Affairs, War Department, and as successor to the Chief of said Bureau holding office at the time of said sale, are accountable as trustees under said trust to the plaintiff, as receiver of said banks for and on behalf of the depositors and other creditors and stockholders of said bank, for the proceeds of said sale of said bonds, together with interest at the legal rate upon the amount of said proceeds from the dates of sale of said bonds, subject to adjustment and deduction for such amount as may be found to be lawfully due the Government of the Philippine Islands as dividends upon the said deposit balance at suspension of said bank, on a parity with other general and unsecured creditors of said bank and subject to such further adjustment as may be necessary
8 arising from the erroneous payment on April 17, 1933, by the conservator, under mistake of law, to the Government of the Philippine Islands of the sum of $25,000.00, and subject to such further adjustment as may be necessary arising from the erroneous payment on August 11, 1933, of $6,620.55 as interest on $750,000.00 from February 26, 1933, to April 16, 1933, at 2% and as interest on $725,000.00 from April 17, 1933, to August 11, 1933, at 2%.

The plaintiff further avers that C. F. Brown is the Disbursing Agent of the Philippine Revenue, Bureau of Insular Affairs, War Department, and as such Disbursing Agent has in his custody and under his control, moneys of the Philippine Islands, and is the Chief Disbursing Agent of Philippine funds in the District of Columbia, and said defendant is sued in his official capacity as Disbursing Agent of funds of the Government of the Philippine Islands, from which the Court may direct the payment of any moneys found due this plaintiff.

8 (a). The plaintiff further avers that on to-wit the 11th day of August, 1933, the date the said bonds were sold, as heretofore described in paragraph 8 of the bill, the proceeds from the sale of said bonds were transmitted to and placed with the Chase National Bank of the City of New York and thereafter said proceeds, together with other moneys paid under mistake of law to George H. Dern and Creed Fulton Cox and transmitted to the Chase National Bank of the City of New York, or part thereof, were transmitted to and placed with Henry Morgenthau, Jr.; and plaintiff further avers, by reason of the facts set forth in said bill of complaint and this amendment, that said proceeds derived from the sale of said securities were funds of the

plaintiff herein, as were the moneys erroneously paid said George H. Dern and Creed Fulton Cox and transmitted by them to the Chase National Bank of the City of New York and by it to said Henry
9 Morgenthau, Jr., and by reason of the foregoing said Henry Morgenthau, Jr., received said proceeds and now holds them in trust for plaintiff.

9. Plaintiff further avers that the funds claimed by him in the bill of complaint, as hereinbefore set forth, are not moneys of the United States are not part of the revenues of the United States, are not subject to the control of the Secretary of the Treasury of the United States in his official capacity as Secretary of the Treasury with respect to moneys of the United States, and said moneys hereinbefore claimed from the defendant, George H. Dern and Arthur L. Flint, in connection with their official position relating to the Panama Canal, are not moneys of the Panama Canal, and said moneys claimed from George H. Dern, Creed Fulton Cox, C. F. Brown and Henry Morgenthau, Jr. are not moneys of the Government of the Philippine Islands, and all of said moneys claimed by plaintiff in said bill of complaint are part of the trust assets of the insolvent District National Bank of Washington, D. C., belonging to the general creditors of the bank, out of which trust assets all creditors are entitled to be paid ratably. The plaintiff further avers that said funds hereinbefore claimed by plaintiff in the bill of complaint have not been covered into the Treasury of the United States or the Treasury of any state, territory, or other government. Plaintiff further avers that the District National Bank of Washington, D. C., was never designated by the Secretary of the Treasury under regulations prescribed by said Secretary, to receive deposits of the Government of the Canal Zone or the Government of the Philippine Islands, nor did the Secretary of the Treasury exact from said District National Bank of Washington, D. C. the pledges of securities which are the subject matter of this suit.

WHEREFORE, the premises considered, the petitioner prays:-
10 1. That a writ of subpoena issue out of this Honorable Court to the defendants, and each of them, requiring them to appear and answer the exigencies of this Bill of Complaint.

2. That the defendants, George H. Dern and Arthur L. Flint, as Secretary of War and General Purchasing Officer and Chief of Washington Office, The Panama Canal, respectively, or their successors in office, be required to account to plaintiff for the sum of $214,739.80, principal, and $3,535.37, alleged accrued interest, paid on September 24, 1933, with interest thereon at the legal rate from September 24, 1933, the date of said payments as aforesaid, to the date of the repayment to plaintiff of said sums; subject to such credits as may be further due said defendants by reason of a 5% distribution as of March 1, 1933, to all of the bank's depositors, and a further dividend of 50% paid depositors as of September 24, 1933, upon provable claims allowed upon 95% of the credit balance of depositors when the bank went on a 5% restricted basis.

3. That George H. Dern, as Secretary of War, and Creed Fulton Cox, as Chief of the Bureau of Insular Affairs, War Department, and C. F. Brown, as Disbursing Agent of the Philippine Revenue, Bureau of Insular Affairs, War Department, be required to account to

plaintiff, as a trust fund for the benefit of the depositors, other creditors and stockholders of the insolvent District National Bank, for the sum of $25,000.00, with interest thereon at the legal rate from April 17, 1933, subject to such offsets as may be interposed thereto, by reason of subsequent dividend payments in said bank.

4. That George H. Dern, as Secretary of War, and Creed Fulton Cox, as Chief of the Bureau of Insular Affairs, War Department, and C. F. Brown, as Disbursing Agent of the Philippine Revenue, Bureau of Insular Affairs, War Department, be required
11 to account to plaintiff, as a trust fund for the benefit of the depositors, and other creditors and stockholders of the insolvent District National Bank, for the sum of $733,421.95, representing $726,801.40 principal and interest due on March 1, 1933, in said account, $6,620.55, representing alleged accrued interest due from March 1, 1933, to August 11, 1933, as adjusted, subject to such credits as may be available to said defendants by reason of dividend payments to depositors of the subject bank, and subject further to such adjustments as may be required for the reimbursement to plaintiff for interest on the moneys wrongfully paid from the dates of such payment to the date of the reimbursement to plaintiff.

5. That the defendant, C. F. Brown, as Disbursing Agent of the Philippine Revenue, Bureau of Insular Affairs, War Department, or his successor in office, be required to pay and satisfy any judgment or decree entered by this Court, in respect to funds of the Government of the Philippine Islands from such moneys as said C. F. Brown, or his successor in office, may have under their control or in their possession.

5 a. That the defendant, Henry Morgenthau, Jr., be required to account for and pay over to the plaintiff, as a trust fund for the benefit of the depositors and other creditors and stockholders of the insolvent District National Bank of Washington, so much of the proceeds from the sale of the bonds described in paragraph numbered 5 of the bill of complaint that have been transmitted to said Henry Morgenthau, Jr., from the Chase National Bank of the City of New York, together with such other moneys of plaintiff erroneously paid under mistake of law to George H. Dern and Creed Fulton Cox and thereafter transmitted by them to the Chase National Bank of the City of New York and by it transmitted to said Henry Morgenthau, Jr.

5 b. That the Court grant such discovery and accounting
12 as the nature of the case may require in order to grant plaintiff the relief herein prayed.

6. And for such other and further relief as to this Honorable Court may seem just and proper.

NORMAN R. HAMILTON,
Receiver, District National Bank.
GEORGE P. BARSE,
Of Counsel.

BRICE CLAGETT,
CHARLES E. WAINWRIGHT,
Attorneys for Plaintiff.

DISTRICT OF COLUMBIA, *ss:*

Norman R. Hamilton, being first duly sworn, deposes and says that he has read the foregoing amended bill of complaint by him sub-

scribed and knows the matters and things therein contained are true to the best of his knowledge and belief.

NORMAN R. HAMILTON, *Receiver.*

Subscribed and sworn to before me this 4th day of June, 1936.

[SEAL]

WM. C. LOCKER,
Notary Public, D. C.

"Exhibit A"

THIS AGREEMENT, made at Washington, District of Columbia, this 18th day of August, 1914, between the SECRETARY OF WAR, the executive officer of the United States charged by the President with the supervision and control over the governmental affairs of the Canal Zone, and the DISTRICT NATIONAL BANK, of Washington, Dis-
13 trict of Columbia, a corporation organized and existing under the banking laws of the United States, hereinafter called the Bank,

WHEREAS, the administrative officers of the Canal Zone have collected and received, and will continue to collect and receive, hold, deposit, disburse and expend municipal, administrative district and various other funds, deposits, postal funds, and other obligations, securities, funds and moneys which may come into their custody, and

WHEREAS, the Secretary of War desires to secure a safe and sure place for the deposit, custody, safe-keeping and disbursement of said moneys and funds, and also an expeditious and effective method of auditing, inspecting examining, transferring and disbursing the said moneys and funds, and

WHEREAS, the Bank guarantees that it has a suitable, safe and convenient place for the deposit of the various funds, deposits, postal funds and other obligations, securities, funds and moneys which may come into the custody of the administrative officers of the Canal Zone, and that it is prepared to undertake the custody and safe-keeping of and accounting for said moneys and funds at its place of business and in its banking house in the District of Columbia,

NOW, THEREFORE, it is understood and agreed as follows:

ARTICLE I. That upon the execution and delivery of this agreement and the deposit with Major F. C. Boggs, Corps of Engineers, United States Army, General Purchasing Officer of The Panama Canal, of bonds as security therefor, as hereinafter provided, there will be deposited with the Bank at its banking house in the City of Washington, District of Columbia, such part of the moneys and funds above referred to and covered by this agreement as may be found convenient and necessary. The deposits will be made in such amounts and
14 at such times as may be practicable and convenient to the Collector of The Panama Canal, or to other officers and agents duly authorized by the Secretary of War.

ARTICLE II. That the Bank, in consideration of the benefits it will derive from being made such place of deposit, the mutual entering into of the agreement herein set forth, and the deposit with it of such moneys and funds, undertakes and agrees to receive and safely keep and disburse and properly account for all moneys and funds deposited with and turned over to it by the Collector of The Panama Canal, or by other agents, or representatives of the Secretary of War.

ARTICLE III. That the amount of the deposits made with the Bank shall be divided into two parts, one part to be known as the "call account" and the other part to be known as the "checking account." The division of funds between the two accounts shall be such that all funds deposited up to the time the Secretary of War gives notice to the Bank to establish a "checking account" shall be charged to the "call account," and that the balance on deposit in said Bank in excess of this sum shall be charged to the "checking account"; Provided, however, that the Secretary of War himself, or through his authorized representative, may order, in his discretion, after thirty days' notice, such changes by reduction or increase in the "call account", or by transfer from the "call" to the "checking account," or vice versa, as the interests of the service may require; and, provided further, that in case of emergency, checks may be drawn against the "call account" for immediate payment, it being understood, however, that such account shall not be subject to check, except in case of emergency, without written notice being given to the Bank thirty days before the draft is made on such "call account"; and, provided further, that all moneys on deposit with said
15 Bank may be placed either entirely in the "call account" or entirely in the "checking account", in the discretion of the Secretary of War.

ARTICLE IV. That the Bank shall pay interest on all moneys and funds deposited under this agreement, as follows:

On the "call account" interest shall be paid on the daily balances at the rate of three (3) per centum per annum, until the "checking account" is established.

When the "checking account" shall have been established, as provided in Article III hereof, interest shall be paid on the minimum monthly balances of the "call account" at the rate of three (3) per centum per annum.

On the "checking account" interest shall be paid on the daily balances at the rate of two and one-half (2½) per centum per annum.

It is understood and agreed that, on the first day of each month, all interest earned for the preceding month on each account shall be placed to the credit of the "checking account"; provided that if there be no "checking account" interest shall be placed to the credit of the "call account."

ARTICLE V. That the Bank shall accept and pay, without charge or discount, all bills, drafts, and checks drawn upon it by the Secretary of War, the Collector of The Panama Canal, or by other officers or persons duly authorized for that purpose, when said bills, drafts, or checks are properly presented or come to it for acceptances or payment, and drawn against said moneys and funds so deposited, and will promptly account for all moneys and funds received and pay over the balance at any time remaining in its hands of all and any moneys and funds so received by it to the said Collector of The Panama Canal, or other officers or persons duly authorized for the purpose by the Secretary of War, or by his succeeding lawfully designated governing authority of the Canal Zone, when called upon so to do.

16 ARTICLE VI. That the Bank on the first day of each month, and at such other times as it may be requested to do so, shall

render a statement of deposits and payments covering the preceding month, or part of month, to the Collector of The Panama Canal, or to such other officers or persons as shall be duly authorized for that purpose, and its books of account shall at all times show the amount of moneys and funds in the keeping of said Bank deposited under this agreement.

ARTICLE VII. That this agreement shall continue in force until terminated on written notice, which may be given at any time by either party to the other: Provided, however, that this agreement shall be immediately terminated should Congress by law direct its termination or give instructions concerning the funds covered by this agreement inconsistent with the terms hereof. In case this contract is terminated the Bank shall immediately pay to the Secretary of War, the Collector of The Panama Canal, or other officers or agents duly authorized for the purpose, any balance remaining to the credit of the account.

ARTICLE VIII. That, as security for the safe-keeping and prompt payment of the moneys and funds deposited under this agreement and the faithful performance thereof, the Bank shall deposit with Major F. C. Boggs, Corps of Engineers, United States Army, General Purchasing Officer of The Panama Canal, bonds of the acceptable value of a sum not less at any times than the amount of moneys and funds deposited under this agreement. Said bonds shall be deposited in the vaults of the American Security and Trust Company in accordance with an agreement of even date herewith, a copy of which is attached hereto and made a part hereof. The Bank agrees to increase the deposit with Major F. C. Boggs of acceptable bonds, as additional moneys and funds are deposited with it, in such amount that the moneys and funds deposited under this
17 agreement will at all times be fully secured by bonds of the following classes at the values specified: "United States, Philippine, Porto Rico, and District of Columbia bonds will be accepted at par; bonds of Hawaiian Territory at ninety (90) per cent, and, if otherwise satisfactory to the Secretary of War, or his representative, Philippine Railway bonds and those of States, municipalities, and high-grade railroads, such as are legal investments for savings banks in the States of New York, Massachusetts, Connecticut, or New Jersey, at ninety (90) per cent of their market value, but not exceeding ninety (90) per cent of their par value."

In the absence or inability of Major Boggs to act, his representative or successor as custodian of said bonds shall be designated by or with the approval of the Secretary of War.

ARTICLE IX. That, in the event the Bank fails to make prompt payment or fails to safely keep the moneys and funds deposited with it, or otherwise fails to faithfully perform all the provisions of this agreement, the said bonds shall become the property of the Secretary of War and may be either retained by him or may be sold, transferred and conveyed, in whole or in part, by the said Secretary of War or his duly authorized agent, as his absolute property, and the proceeds realized from the said sale or sales shall be applied by the said Secretary of War or his agent, to the liquidation of any amount due by the Bank under this agreement, any residue thereof, after said liquidation to be delivered to the Bank.

ARTICLE X. That all or any acts which may be performed, and all or any orders which may be given, by the Secretary of War under this agreement may be performed or be given by the Acting Secretary of War with the same force and effect as if they were performed or given by the Secretary of War himself.

18 IN WITNESS WHEREOF, the Secretary of War has signed this agreement in triplicate, and the Bank has caused it to be signed likewise in triplicate by its proper officers and its corporate seal affixed thereto the day and year first above written.

(Signed) LINDLEY M. GARRISON,
Secretary of War.

In the presence of:
(Signed) F. C. BOGGS.

[SEAL] DISTRICT NATIONAL BANK,
Washington, D. C.

By (Sgd) ROBT. N. HARPER,
as its President.

Attest:
(Signed) EDMUND S. WOLFE,
as its Cashier.

Exhibit B

List of various and sundry bonds pledged by the District National Bank of Washington to A. L. Flint, general disbursing officer and chief of office, Panama Canal * * *

$5,000.00	Par value, Federal Land Bank 4½'s 1933
49,000.00	Par value, Federal Land Bank 4½'s Bonds
90,000.00	Par value, Federal Land Bank 4½'s 1953
40,000.00	Par value, Federal Land Bank 4½'s 1936–56
45,000.00	Par value, Federal Land Bank 4½'s 1942–32
15,500.00	Par value, U. S. Treasury 3% Bonds 1951–55
11,200.00	Par value, U. S. 3¼% Treasury Notes, 1937
5,000.00	Par value City of San Francisco, 4½%, 1938
6,000.00	Par value City of Boston, Mass. 4¼%, 1939
$274,200.00	

19 *Order substituting party plaintiff*

Filed July 13, 1936

* * * * * * *

Upon consideration of the motion of the plaintiff in the above-entitled cause for leave to substitute Justus S. Wardell as plaintiff in the above-entitled cause in the place of Norman R. Hamilton, resigned, it is, by the Court, this 13th day of July, A. D., 1936

ORDERED, that the said Justus S. Wardell be, and he hereby is, substituted as plaintiff in the above-entitled cause in the place of Norman R. Hamilton, now resigned as Receiver of the District National Bank of Washington.

DANIEL W. O'DONOGHUE, *Justice.*

O. K.
DAVID A. PINE,
Asst. U. S. Atty.

Suggestion of death and substitution of parties defendants

Filed October 6, 1936

* * * * * * *

This cause having come on for further consideration, upon the suggestion made in open Court by counsel for the plaintiff and defendants herein of the death of defendants George H. Dern and Arthur L. Flint, and it appearing to the satisfaction of the Court that Harry H. Woodring has succeeded the decedent George H. Dern as Secretary of War and that H. A. A. Smith has succeeded the decedent Arthur L. Flint as General Purchasing Officer and Chief of Washington Office, The Panama Canal, it is by the Court this 6th day of October, 1936

ORDERED, That Harry H. Woodring be, and he hereby is, made a party defendant herein in the place and stead of George H.
20 Dern, deceased, and it is further ordered that H. A. A. Smith be, and he hereby is, made a party defendant herein in the place and stead of Arthur L. Flint, deceased.

ALFRED A. WHEAT, *Chief Justice.*

Answer of defendants Woodring, et al., to amended bill

Filed October 31, 1936

* * * * * * *

Come now, Harry H. Woodring, Secretary of War, H. A. A. Smith, Chief of Office and General Purchasing Officer, Panama Canal, Creed Fulton Cox, Chief of Bureau of Insular Affairs, War Department, and C. F. Brown, Disbursing Agent, Philippine Revenue, Bureau of Insular Affairs, War Department, named defendants in the above-entitled cause, and for answer to the amended bill of complaint herein filed, or to such part or parts thereof as they are advised it is material for them to answer, answer and say:

1. Defendants admit the allegations contained in paragraph numbered 1 of said amended bill of complaint.

2. Defendants admit that George H. Dern was at the time of the filing of the amended bill of complaint, Secretary of War, but aver that he has since died and that Harry H. Woodring is now Secretary of War and as such, has been substituted as a party defendant in the place and stead of said George H. Dern.

3. Defendants admit that Arthur L. Flint was, at the time of the filing of the original bill of complaint, General Purchasing Officer and Chief of the Washington Office, Panama Canal, but aver that he died on or about May 18, 1936, and that H. A. A. Smith has succeeded him and has been substituted in his official capacity only
21 as a party defendant in the place and stead of said Arthur L. Flint; that his title in said office is now Chief of Office and General Purchasing Officer, Panama Canal.

4 & 5. Defendants admit the allegations of paragraphs 4 and 5 of said amended bill of complaint.

5 (a). These defendants admit the allegations concerning the citizenship and temporary residence of defendant Henry Morgenthau, Jr., as alleged in paragraph 5 (a).

5 (b). These defendants deny that Harry H. Woodring and H. A. A. Smith are sued as individuals in this cause; on the contrary, they aver that they are made parties in their respective official capacities only by substitution in place of their predecessors in office.

6. Defendants admit the allegations contained in paragraph numbered 6 of the amended bill of complaint.

7. Defendants Creed Fulton Cox, Chief of Bureau of Insular Affairs of the War Department and C. F. Brown, Disbursing Agent, Philippine Revenue, Bureau of Insular Affairs of the War Department, aver that they have no knowledge of, interest in or concern with, the matters and things set forth in paragraph 7 of the said bill of complaint and that the allegations therein contained state no cause of action against them or either of them.

Defendants Harry H. Woodring, Secretary of War, and H. A. A. Smith, Chief of Office and General Purchasing Officer, Panama Canal, answering said paragraph numbered 7, admit that the Panama Canal Zone territory was placed under the supervision of the Secretary of War; they admit the opening of deposit accounts as specified, in the District National Bank pursuant to the contract entered into between the said Bank and the then Secretary of War as alleged in subparagraphs one and two of said paragraph 7; they also admit that the balances due at the time of the closing of said bank were as stated in said subparagraphs.

22 Said defendants admit the pledge of bonds of the amount and as described, and the deposit thereof with the then General Purchasing Officer of the Panama Canal as set forth in the third subparagraph of said paragraph numbered 7 but deny that said pledge and deposit were, or either of them was, unlawful and illegal or without authority of law; they further deny that the then Secretary of War was without authority to receive and accept the said securities as collateral for said deposits and deny that said securities were held in trust for the said District National Bank by the then Secretary of War or are so held by these defendants.

Said defendants admit the sale of the bonds or securities referred to, to the Hamilton National Bank, and the payment of the proceeds thereof in the sum specified and interest, in the manner and as alleged in subparagraph 4 of said paragraph 7 but deny that said payment was made illegally or under a mistake of law; on the contrary, these defendants aver that said sale and said payment were in all respects regular, lawful and in accordance with authority conferred upon the Secretary of War under Acts of Congress and regulations pursuant to statutory authority.

Said defendants deny that the said proceeds of the sale of the bonds were or are a trust fund, and deny that they are recoverable as such by plaintiff as alleged in subparagraph five of said paragraph 7.

Further answering said allegations, said defendants aver that the making of the contract for the deposit and delivery of said securities, a copy of which is made Exhibit "A" to the bill of complaint and is incorporated in this answer by reference, was within the authority and power of the Secretary of War conferred upon him by Acts of Congress and by regulations promulgated pursuant

to statutory authority; that the securities pledged pursuant to
23 the terms of said contract were lawfully in the possession of defendant Secretary of War's predecessors in office; that the deposits for which said securities were pledged were at the time of the closing of said bank, almost entirely composed of moneys received by the Postal Service of the Canal Zone and consisted of deposit money order funds and money order funds, which the United States is obligated to redeem and pay.

Further, said defendants aver that by the Panama Canal Act of June 28, 1902 and the supplementary act of April 28, 1904, the President of the United States was given complete governmental control over the Canal Zone with power to legislate either directly or through the Isthmian Canal Commission, or such other persons as he might designate; that the President authorized the Secretary of War to exercise these powers on his behalf; that the then Secretary of War in 1904 directed the Isthmian Canal Commission to establish a postal service in the Canal Zone and said service was established by Act No. 7 of September 2, 1904, of the said Commission; Section 42 of said Act provided that the Postal Service of the Canal Zone should "be conducted, regulated, and controlled by such of the laws, rules, and regulations of the postal service of the United States as are not inapplicable to the conditions of law and fact existing in the Canal Zone, and the laws enacted and the rules and regulations adopted by the Isthmian Canal Commission," this provision being re-enacted in the Act of February 16, 1933, 47 Stat. 812, as a part of the Canal Zone Code then in course of enactment. Further, that by section 1 of the Act of August 21, 1912, c. 387, 37 Stat. 512, U. S. Code, Title 39, section 759, it was provided, with respect to Postal Savings funds of the United States, that such funds should be deposited in solvent banks, whether organized under national or State laws, being subject to national or state supervision and examination and that "the board of trustees shall take from such banks such securities
24 in public bonds or other securities, authorized by act of Congress or supported by the taxing power, as the board may prescribe, approve, and deem sufficient and necessary to insure the safety and prompt payment of such deposits on demand." These defendants aver that the provision of said section insofar as it required security for postal savings funds was not inapplicable, but was applicable, to deposit money orders issued in the Canal Zone; and that it made it incumbent upon the Secretary of War and those under his supervision having direct control of the funds, to require security from banks before making deposits, and authorized the bank to give such security; further, that Section 2 of the Panama Canal Act of August 24, 1912, 37 Stat. 560, ratifying and confirming as valid and binding "all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government * * * of the Canal Zone" ratified and confirmed the directions and actions of the Secretary of War in requiring the deposit of securities to safeguard the public moneys of the Canal Zone under his supervision; further, that Section 6 of the Act of August 21, 1916, 39 Stat. 528, authorized the issue of deposit money orders in the Canal Zone, in lieu of postal savings certificates then in existence, and by Section 7 of said Act, ratified the action taken by the Secretary of

War in depositing money order funds in banks under Canal Zone regulations, and authorized the use of interest received therefrom to pay interest on deposit money orders, and any losses chargeable to the Canal Zone Postal Service, and that this was further ratified and confirmed by Section 11 of the Act approved September 21, 1922, increasing the interest rate on deposit money orders to not to exceed 3% ; that in conformity with the orders of the President of October 22, 1916, and December 6, 1922, the Governor of The Panama Canal was authorized to prescribe detailed regulations to carry out
25 the terms of the order, and that the Governor did, by Circular No. 660-61 of April 5, 1923, provide that:

"Postal savings, money order, clubhouse, and other trust and security funds received shall be remitted to depositories in accordance with contracts entered into by the Secretary of War, and disbursed only on vouchers or warrants approved by the Auditor."

that is, the Auditor of the Panama Canal, whose position was established by Executive Order of the President, and who had supervision o the Department having charge of the "collection, custody, and disbursement of funds for the Panama Canal and Canal Zone."

Further answering said paragraph 7, said defendants aver that the action of the Secretary of War in requiring security for the deposits aforesaid and in entering into the contract of August 18, 1914, was in accordance with a practice and custom, initiated in respect of Panama Canal funds, January 19, 1909 by a contract entered into on that date between the Commercial National Bank of Washington, D. C., and the Government of the Canal Zone, which contract was superseded by a contract dated May 11, 1910, between said bank and the Secretary of War and to which latter contract there was a supplemental agreement dated April 13, 1913; that the action of the Secretary of War and his subordinates in negotiating for the giving of security to safeguard deposits and of the entering into said contracts was the subject of correspondence between both the Secretary of War and The Panama Canal, and the Treasury Department, and was approved by the Secretary of the Treasury, and the entering into of the contract with the District National Bank, made a part of this answer by reference, was specifically recommended by the Comptroller of the Currency and the Secretary of the Treasury.

That said practice and custom were recognized, acted upon, and adopted in respect of other deposits of funds which were under the control of or administered by other departments or agen-
26 cies of the United States and was continued without objection or question or challenge for more than twenty years and until after the closing of the various banks in which such funds were deposited.

These defendants further aver that said practice and custom were also known to the respective Comptrollers of the Currency during the period of more than twenty years since its inception and up to and subsequent to the sale of the securities complained of in the bill of complaint; that no objection thereto was ever raised or made by any of the said Comptrollers and the said practice and custom aforesaid were recognized and received and had the approval and sanction of said officials; that the Comptroller of the Currency was also aware

of the proposed sale of the said securities and made no objection thereto and took no action to prevent it but sanctioned and approved the said sale.

Further, that Congress was informed that security for deposits of Canal Zone funds was being exacted of, and given by, banks; Annual Reports of the Isthmian Canal Commission made to it for the years 1913 to 1916, inclusive; and also by reports made to it by Congressional Committees on proposed legislation for the Canal Zone.

For a further and separate defense to the alleged cause of action set forth in said paragraph 7, these defendants say that the plaintiff ought not to have and maintain this suit, for the following reasons:

1. The said deposits made in the District National Bank were of monies of the United States so deposited by agents of the United States; that the said securities were pledged to insure said deposits and were given and received for the United States; the sale thereof and the deposit of the proceeds in the Hamilton
27 National Bank was for and on behalf of the United States and the credit thereby established is a credit of and for the United States; that any decree or judgment against these defendants would affect materially the United States in respect of its resources and assets; that the United States is, therefore, the real party in interest as a defendant and an indispensable party to this suit in whose absence the Court ought not to proceed.

2. The plaintiff has a plain and adequate remedy at law against the United States in the United States Court of Claims for the amount claimed.

8. Defendant H. A. A. Smith, Chief of Office and General Purchasing Officer, Panama Canal, answering said paragraph numbered 8, avers that he has no knowledge or information of, or interest in, or concern respecting the matters and things alleged therein, and that no cause of action against him is set forth in said paragraph.

Defendants Harry H. Woodring, Secretary of War, Creed Fulton Cox, Chief of Bureau of Insular Affairs, War Department, and C. F. Brown, Disbursing Agent Philippine Revenue, Bureau of Insular Officers, War Department, answering said paragraph, admit the allegations of fact contained in the subparagraphs one, two and three of said paragraph 8 except the allegation contained in subparagraph two that the Secretary of War, through and by the then Chief of the Bureau of Insular Affairs, held, as pledgee, the assets referred to, which allegation defendants deny and on the contrary aver that the pledgee was the Government of the Philippine Islands; further, they deny that the pledging of security for the deposit account specified, by the District National Bank was without authority of law as alleged in subparagraph two.

Said defendants aver that the allegations contained in subparagraph four of said paragraph 8 are conclusions of law to which
28 they are not required to make answer; nevertheless, they deny said allegations, and specifically deny that there was no authority for giving the said pledge by the said District National Bank; deny that the assets received by the then Secretary of War or his subordinates were subject to any trust in favor of the said bank or its depositors or creditors or are now so held and deny that they or any of them are accountable therefor. Further and particularly

answering that allegation of said subparagraph relative to the alleged erroneous payment by the then Conservator of the said District National Bank of the sum of $25,000 to the Government of the Philippine Island, these defendants aver that if, as alleged in said subparagraph, the said payment was made "under mistake of law," there can be no recovery in respect thereto.

Answering subparagraph 5 of said paragraph 8, defendants admit allegations as to the official status of defendant C. F. Brown; as to the power of the Court asserted in said subparagraph, these defendants submit that no answer is required of them.

8 (a). These defendants admit that the proceeds of the sale of the bonds, described in paragraph 8, were transmitted to and placed with the Chase National Bank of the City of New York as alleged in paragraph 8 (a) of the amended bill of complaint. Defendants are without knowledge or information sufficient to form a belief as to whether, as alleged in said paragraph numbered 8 (a), said proceeds or any part thereof were transmitted to defendant Henry Morgenthau, Jr., and therefore deny the allegation to that effect and demand strict proof thereof, if the same be material. Defendants further deny that the monies deposited with defendant Morgenthau, Jr., were or are funds of the plaintiff herein and deny that said Morgenthau, Jr., received and holds the same in trust for plaintiff; on the contrary, these defendants aver that said proceeds and the
29 amount of said payment were and are monies of the government of the Philippine Islands and were deposited with the said Chase National Bank to the credit of the Treasurer of the Philippine Islands; that said bank had been designated as a branch of the Philippine Insular Treasury and as a depositary of the government of the Philippine Islands.

Further, defendants aver that the monies alleged to have been transmitted by the said Chase National Bank and held by and in the custody of defendant Henry Morgenthau, Jr., are monies of the Government of the Philippine Islands and are held by him as Secretary of the Treasury under the authority of the Act of June 11, 1934, 48 Stat. 929.

Further answering said amended bill of complaint, defendants aver that section 625 of the Revised Administrative Code of 1917 of the Philippine Islands was and is authority for the requirement of security to insure deposits of funds of the Philippine Government and constituted ample authority for the giving of the security herein involved by the District National Bank and the receipt of it by the then Secretary of War. That said section 625 is as follows:

"The Governor-General may appoint any bank or banking institution in the Philippine Islands, and the Secretary of War any similar institution in the United States, as a depositary of the Government of the Philippine Islands, after such institution has filed sufficient evidence of its sound financial condition and has deposited, as security, either in the Insular Treasury or in the Bureau of Insular Affairs, at Washington, bonds of the United States or of the Government of the Philippine Islands or other bonds or securities satisfactory to and approved by the officer making the appointment and in such amount as shall be required by him."

That the enactment of said section was reported to the Congres
the United States, pursuant to the requirement of section 19 of
Act of Congress of August 29, 1916, Ch. 416, 39 Stat. 551, wh
provides that:

30 "All laws enacted by the Philippine Legislature shall be
ported to the Congress of the United States, which reser
the power and authority to annul the same."

That Congress did not annul said enactment and thus taci
approved the same.

That substantially similar provisions to those contained in said s
tion 625 were contained in an enactment of the Philippine Comm
sion of October 12, 1907 (Section 596, Compilation of Acts of t
Philippine Commission). These two provisions were expressly rec
nized and continued in force and effect by section 6 of the said A
of August 29, 1916, 48 U. S. Code, 1004.

Further answering said amended bill of complaint, said defendar
aver that the giving of the said bond by the District National Ban
a copy of which is made Exhibit "C" to the bill of complaint here
and made a part of this answer by reference, and the deposit of t
securities was in accordance with a practice and custom in respect
funds of the Philippine government which has existed and continu
since the year 1908; that during said period, the various Secretari
of War, acting under the provisions of said section 596 enacted Oct
ber 12, 1907 and said section 625, of the Revised Administrati
Code, have from time to time designated certain state and nation
banks within the continental limits of the United States as depos
taries for funds of the Philippine Government and people, the sever
Governors-General of the Philippine Islands have designated th
same banks as branches of the insular Treasury, and the Treasure
of the Philippine Islands have placed and kept on deposit therei
large amounts of the public funds of the People of the Philippi
Islands, for the purpose of maintaining the parity of Philippine bond
notes, coinage and currency; that the total amount of such de
31 posits in the United States formerly approximated $63,000,00
and these deposits were formerly distributed among 39 nationa
banks and 18 state banks.

That each depositary bank was required to deposit, and deposited
with or to the order of the Chief of the Bureau of Insular Affairs
War Department, collateral security of a value equivalent to th
amount of the deposit, in each instance under a formal pledge agree
ment in writing authorizing recourse by the pledgee to the pledge
collateral in the event of a failure to repay the amount of the deposit
that such custom and practice were recognized, well-known, acte
upon and continued without objection, question or challenge for about
twenty-five years and until after the closing of the District National
Bank; that such custom and practice were also known to the respec
tive Comptrollers of the Currency during the said period since its
adoption and up to and subsequent to the sale of the said securities;
that no objection thereto was ever raised or made by any of the said
Comptrollers and said practice and custom aforesaid were recognized
and received and had the approval and sanction of said officials.

Further, that the Comptroller of the Currency was also aware of
and was consulted with, concerning the proposed sale of the said

securities here involved and took no action to prevent it but sanctioned and approved the said sale; that the plaintiff's predecessor, as receiver of the said District National Bank, interposed no objection to said sale and acquiesced therein, after being authorized so to do by the Comptroller of the Currency.

Said defendants further aver that said practice and custom of requiring and receiving security has obtained for many years in respect of deposits of other funds which were under the control of or administered by other departments or agencies, or officers of the
32 United States, or with respect to which such departments, agencies or officers had or performed any duties or functions and such practice and custom continued without objection or question until after the closing of the various banks in which such funds were deposited.

Further answering said amended bill of complaint, these defendants aver that they had no part or participation, either officially or personally in the transactions complained of in said bill; that defendants Woodring and Brown had at no time and do not now have any authority, control or supervision over, or functions in respect of, the said funds deposited in the said Chase National Bank and which it is alleged were in whole or in part transferred and placed in the custody of defendant Henry Morgenthau, Jr.; that defendant Cox, as Chief of the Bureau of Insular Affairs of the War Department, in respect of moneys in the Chase National Bank to the credit of the Treasurer of the Philippine Islands has authority to order the transfer thereof to the United States Treasury or to the Philippine National Bank of New York city, in respect of deposits of moneys made under the said Act of June 11, 1934 (48 Stat. 929) in the United States Treasury and which are deposited to the credit of the Treasurer of the Philippine Islands, said defendant has authority to order the transfer thereof to the said Chase National Bank; except as herein specified, said defendant Cox has no authority, control or supervision over such monies, funds or deposits.

For a further and separate defense, the said defendants say that the plaintiff ought not to have and maintain his suit for the following reasons:

1. The funds sought to be recovered are funds of the Government of the Philippine Islands, and the bond given and the pledge of securities made to insure the deposits made in the District National Bank were given and made to the Government of the Philippine Islands, which is the real party in interest herein.

33 2. The suit in respect of the asserted cause of action affecting these defendants is, in essence, one against the Government of the Philippine Islands, which has not consented to be sued herein.

3. The Government of the Philippine Islands is an indispensable party to this suit, one whose interests are involved and vitally affected by this suit, and in whose absence the Court ought not to proceed.

4. The amended bill of complaint states no cause of action against these defendants or any of them cognizable in equity and sets forth no facts warranting the relief sought against them or any of them.

5. The plaintiff is not entitled to any recovery or relief against these defendants or any of them, since his predecessor as conservator or receiver consented to and acquiesced in the sale of the securities

and voluntarily made the payment set forth in subparagraph 4 of paragraph 8 of the amended bill of complaint; by reason of which plaintiff is estopped from suing or recovering.

6. The plaintiff is not entitled to any recovery or relief against the defendants because of the doctrine in pari delicto, potior est conditio defendentis.

7. The plaintiff is not entitled to any relief or recovery against defendant Harry H. Woodring because he is not properly a party hereto, there being no authority for his substitution as a party defendant in place of George H. Dern, deceased, since the statute under which substitution was granted does not apply to or cover a case such as that presented by the amended bill of complaint.

9. Answering paragraph numbered 9, defendants Harry H. Woodring and H. A. A. Smith admit that the funds and money
34 referred to in paragraph numbered 7, to wit, the so-called Panama Canal funds, are not public funds and are not part of the revenue of the United States; that they are not subject to the control of the Secretary of the Treasury in his official capacity as such Secretary in respect of public moneys of the United States; but in this connection they aver that the interest accruing on said moneys is part of the revenues of the United States; and further that in respect of such of said moneys as were derived from the issuance of Postal Money Orders, they are funds for the payment of which the United States is responsible and obligated.

Said defendants deny that said moneys are not moneys of the Panama Canal, as alleged in said paragraph and on the contrary aver that they are moneys of the said Panama Canal. These defendants admit that the District National Bank was never designated by the Secretary of the Treasury as depository of the Government of the Canal Zone, but say that the Secretary of the Treasury did approve of the depositing in the said District National Bank of moneys of the Panama Canal. Said defendants admit that the Secretary of the Treasury did not exact of the said Bank, the pledge of the securities given to insure the deposits of the Panama Canal funds but they aver that the Secretary of the Treasury was consulted by the Secretary of War in respect of the latter's proposal to require securities for said deposits and approved the same.

Defendant H. A. A. Smith is without knowledge or information concerning the other allegations of fact contained in said paragraph 9 and, therefore, denies them.

Defendants Harry H. Woodring, Creed Fulton Cox, and C. F. Brown, answering in respect of the moneys specified in paragraphs 8 and 8 (a), to wit, the moneys involved in the transactions of
35 the Government of the Philippine Islands, admit that said moneys are not moneys of the United States and are not subject to the control of the Secretary of the Treasury in his official capacity in respect of moneys of the United States; they aver, however, that said moneys are moneys of the Government of the Philippine Islands and that said moneys are deposited with the Secretary of the Treasury as moneys of the Government of the Philippine Islands pursuant to the Act of June 11, 1934, and are held in the Treasury of the United States to the credit and for the account of the Treasurer of the

Philippine Islands and are claimed by said government as a part of its public moneys.

Said defendants admit that the said District National Bank was never designated by the Secretary of the Treasury to receive deposits of the Government of the Philippine Islands and that the Secretary of the Treasury never exacted from said bank the pledge of the securities to secure deposits of the Government of the Philippine Islands; but these defendants aver that the Comptroller of the Currency, a subordinate of the Secretary of the Treasury, knew of said deposits made in said Bank by and on behalf of the Government of the Philippine Islands and that securities to insure the same had been exacted from said Bank and acquiesced in said transactions.

As to the other allegations of fact contained in said paragraph, defendants Creed Fulton Cox and C. F. Brown are without knowledge or information and, therefore, deny the same.

WHEREFORE, having made full answer, all these defendants
36 pray that the said amended bill of complaint be dismissed as to them with costs against the plaintiff.

HARRY H. WOODRING,
Secretary of War.
By MALIN CRAIG,
Acting Secretary of War.
CREED FULTON COX,
Chief of Bureau of Insular Affairs, War Department.
C. F. BROWN,
Disbursing Agent, Philippine Revenue, Bureau of Insular Affairs, War Department.
H. A. A. SMITH,
Chief of Office and General Purchasing Officer, Panama Canal.

LESLIE C. GARNETT,
United States Attorney.
H. L. UNDERWOOD,
Assistant United States Attorney.
E. M. CAFFEY,
Captain, Judge Advocate General's Office, War Department.
Attorneys for defendants.

DISTRICT OF COLUMBIA, ss:

Malin Craig, being first duly sworn, deposes and says that he is Acting Secretary of War of the United States, and as such has subscribed to the foregoing answer made on behalf of Harry H. Woodring, Secretary of War, one of the defendants in the above-entitled cause; that he has subscribed to said answer and makes this affidavit and verification on behalf of said defendant, because of the absence of the latter from the District of Columbia; that he has read the foregoing answer by him so subscribed and knows the contents thereof, and that the facts therein stated he verily believes to be true.

MALIN CRAIG.

Subscribed and sworn to before me this 30th day of October 1936.

[SEAL] HERBERT F. STATESIR,
Notary Public, D. C.

My Commission Expires Feb. 1, 1941.

37 DISTRICT OF COLUMBIA, ss:

Creed Fulton Cox, being first duly sworn, deposes and says that he is Chief of Bureau of Insular Affairs, War Department, and as such, named one of the defendants in the above-entitled cause; that he has read the foregoing answer by him subscribed and verily believes the facts stated therein to be true.

CREED FULTON COX.

Subscribed and sworn to before me this 29th day of October, 1936.

[SEAL] ALFRED H. MORI,
Notary Public, D. C.

DISTRICT OF COLUMBIA, ss:

C. F. Brown, being first duly sworn, deposes and says that he is Disbursing Agent, Philippine Revenue, Bureau of Insular Affairs, War Department, and as such, named one of the defendants in the above-entitled cause; that he has read the foregoing answer by him subscribed and verily believes the facts stated therein to be true.

C. F. BROWN.

Subscribed and sworn to before me this 29th day of October, 1936.

[SEAL] ALFRED H. MORI.
Notary Public, D. C.

DISTRICT OF COLUMBIA, ss:

H. A. A. Smith, being first duly sworn, deposes and says that he is Chief of Office and General Purchasing Officer, Panama Canal, and as such, named one of the defendants in the above-entitled cause; that he has read the foregoing answer by him subscribed and verily believes the facts stated therein to be true.

H. A. A. SMITH.

Subscribed and sworn to before me this 29th day of October, 1936.

[SEAL] FLOYD B. HEIMER,
Notary Public, D. C.

38 *Motion to strike paragraph 7 and defenses 1 and 2 in answer, etc.*

Filed March 22, 1937

* * * * * * *

Comes now Justus S. Wardell, Receiver of the District National Bank of Washington, plaintiff herein by his attorneys and moves the Court to strike Paragraph 7 and defenses 1 and 2 set forth in the answer of defendants Harry H. Woodring, Secretary of War and H. A. A. Smith, Chief of Office and General Purchasing Officer of Panama Canal, and for the entry of a decree pro confesso for the plaintiff against said defendants, and for reasons therefor states as follows:

1. The said answer does not set up any defenses to the cause of action alleged in plaintiff's amended bill of complaint, and plaintiff is entitled to have said Paragraph 7 and said defenses 1 and 2 stricken, and is entitled to a decree pro confesso against said defendants upon the averments of plaintiff's amended bill of complaint.

2. The pledge of the assets of the District National Bank to secure deposits of the government of the Canal Zone was unauthorized in law, ultra vires the bank, and void; and such pledge constituted an illegal and preferential disposition of the assets of the bank, and the Receiver may recover either the pledged securities or their proceeds without restitution by payment in full of the credit balance on deposits in the bank at suspension.

3. And for the additional reasons and principals of law set forth in the attached memorandum of Points and Authorities in support of this Motion.

BRICE CLAGETT,
CHARLES E. WAINWRIGHT,
Attorneys for Plaintiff.

39 *Memorandum of Court*

Filed July 14, 1937

* * * * * * *

Motion to strike answers of Defendants Woodring and Smith—sustained.

LUHRING, *J.*

40 *Order sustaining motion to strike, etc.*

Filed August 23, 1937

* * * * * * *

This cause having come on for hearing at this term of Court upon the plaintiff's motion to strike paragraph 7 and defenses 1 and 2 of the answer filed by defendants herein and for a decree pro confesso against said defendants, and it appearing to the satisfaction of the Court that said motion should be granted, it is by the Court this 18" day of August, A. D. 1937,

ADJUDGED, ORDERED AND DECREED, that the motion of plaintiff to strike paragraph 7 and separate defenses 1 and 2 of the answer of Harry H. Woodring, Secretary of War, and H. A. A. Smith, Chief of Office and General Purchasing Officer of Panama Canal, and for a decree pro confesso against said defendants be and said motion is hereby granted; and, the said defendants, Harry H. Woodring, Secretary of War, and H. A. A. Smith, Chief of Office and General Purchasing Officer of Panama Canal, having elected to stand on their respective answers as filed and having stipulated that a final decree be entered at this time, it is further

ADJUDGED, ORDERED AND DECREED, that the defendants, Harry H. Woodring, Secretary of War, and H. A. A. Smith, Chief of Office and General Purchasing Officer of Panama Canal, be and they are hereby ordered and directed to pay over to the plaintiff herein the sum of $207,361.41, with interest at the legal rate from September 24, 1933 to September 25, 1933, as of which date a credit and offset of 50% dividend on defendants' provable claims in the sum of $207,361.41 amounting to $103,680.70 is hereby awarded and credited, and thereafter the balance of said judgment amounting to $103,680.71 will be

subject to and will carry interest at the legal rate from Septem-
41 ber 25, 1933 to December 7, 1936, on which date a credit and offset of 25% dividend on defendants' provable general claim in the sum of $207,361.41 amounting to $51,840.35 is hereby awarded and credited, and thereafter the balance of said judgment amounting to $51,840.36 will be subject to and will carry interest at the legal rate from December 7, 1936 until paid; and it is further

ADJUDGED, ORDERED AND DECREED, that the defendants Harry H. Woodring, Secretary of War, and H. A. A. Smith, Chief of Office and General Purchasing Officer of Panama Canal, are entitled to file a claim against the Receiver of the District National Bank of Washington and to receive such further dividends thereon as are paid to unsecured depositors and other general creditors of said bank; and it is further

ADJUDGED, ORDERED AND DECREED, that execution may issue against the defendants upon the judgment herein awarded.

O. R. LUHRING, *Justice.*

The defendants, by their attorneys, object and except to the entry of the above order and decree of the Court, which objection and exception is hereby allowed by the Court, and an appeal is noted in open court to the United States Court of Appeals for the District of Columbia which appeal is hereby allowed by the Court.

O. R. LUHRING, *Justice.*

No objection to the form. The defendants consent to the entry of a final decree herein in place of a decree pro confesso.

H. L. UNDERWOOD,
Assistant United States Attorney.

42 *Assignment of errors of Defendants Woodring and Smith*

Filed September 1, 1937

* * * * * * *

(1) The Court erred in holding and determining that there was no authority for the pledging by the District National Bank of the securities involved to safeguard the deposits of the funds of the Panama Canal and in not holding and determining that such authority existed.

(2) The Court erred in not holding and determining that the giving of the securities by the District National Bank was warranted by custom and usage long established, well recognized and unquestioned for many years, and also sanctioned by the Secretary of the Treasury and the Comptroller of the Currency.

(3) The Court erred in not holding and determining that the plaintiff was estopped from bringing and maintaining this suit by the action of his predecessor, the Conservator of the said bank, approved by the Comptroller of the Currency, in agreeing to the sale of the securities and the setting up in the Hamilton National Bank of the credit account in the name of the Secretary of War.

(4) The Court erred in not holding and determining that the United States is an indispensable party to this suit insofar as the funds of the Panama Canal are concerned.

(5) The Court erred in not holding and determining that the answer of these defendants constituted a complete defense to the suit against them; and in not overruling plaintiff's motion to strike and for a decree pro confesso.

(6) The Court erred in sustaining the plaintiff's motion to strike and for a decree pro confesso.

43 (7) The Court erred in entering a decree against these defendants.

LESLIE C. GARNETT,
United States Attorney,
H. L. UNDERWOOD,
Assistant United States Attorney,
Attorneys for said defendants.

Service of a copy hereof is hereby acknowledged this 1st day of September 1937.

BRICE CLAGETT,
CHARLES E. WAINWRIGHT,
Attorneys for Plaintiff.

Designation of record

Filed September 1, 1937

* * * * * * *

The Clerk will please prepare the record on appeal herein, including therein the following:

(1) Amended Bill of Complaint with Exhibits "A" and "B."

(2) Answer of defendants Harry H. Woodring, Secretary of War, and H. A. A. Smith, Chief of Office, Panama Canal, to Amended Bill of Complaint.

(3) Motion of plaintiff to strike portions of the answer of these defendants and for a decree pro confesso.

(4) Memorandum of Court sustaining motion.

(5) Final decree against these defendants.

(6) Notation of appeal.

(7) Assignment of Error.

44 (8) This designation.

LESLIE C. GARNETT,
United States Attorney,
H. L. UNDERWOOD,
Assistant United States Attorney,
Attorneys for defendants Harry H. Woodring, Secretary of War, and H. A. A. Smith, Chief of Office, Panama Canal.

Service of a copy of this Designation is hereby acknowledged this 1st day of September, 1937.

BRICE CLAGETT,
CHARLES E. WAINWRIGHT,
Attorneys for Plaintiff.

45 District Court of the United States for the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, CHARLES E. STEWART, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 44, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 59007 in Equity, wherein Norman R. Hamilton, Receiver, District National Bank of Washington, a Corporation, is Plaintiff, and George H. Dern, Secretary of War, et al., are Defendants, as the same remains upon the files and of record in said Court.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District this 22nd day of October, 1937.

[SEAL] C. E. STEWART, *Clerk.*

No. 7055. Woodring, Sec'y. of War, et al., Appellants, vs. Wardell, Receiver. United States Court of Appeals for the District of Columbia. Filed Oct. 26, 1937. Moncure Burke, Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1937

Thursday, May 12th, A. D. 1938

* * * * * * *

No. 7055

HARRY H. WOODRING, SECRETARY OF WAR, AND H. A. A. SMITH, GENERAL PURCHASING OFFICER AND CHIEF OF WASHINGTON OFFICE, PANAMA CANAL, APPELLANTS

vs.

JUSTUS S. WARDELL, RECEIVER, DISTRICT NATIONAL BANK OF WASHINGTON, D. C.

The argument in the above entitled cause was commenced by Mr. Leslie C. Garnett, attorney for appellants, and was continued by Mr. Brice Clagett, attorney for appellee. (Mr. Justice Stephens and Mr. Justice Edgerton not sitting.)

* * * * * * *

Friday, May 13th, A. D. 1938

The argument in the above entitled cause was concluded by Mr. Brice Clagett, attorney for appellee. (Mr. Justice Stephens and Mr. Justice Edgerton not sitting.)

* * * * * * *

United States Court of Appeals for the District of Columbia

No. 7055

HARRY H. WOODRING, SECRETARY OF WAR, AND H. A. A. SMITH, GENERAL PURCHASING OFFICER AND CHIEF OF WASHINGTON OFFICE, PANAMA CANAL, APPELLANTS

v.

JUSTUS S. WARDELL, RECEIVER, DISTRICT NATIONAL BANK OF WASHINGTON, D. C., APPELLEE

Appeal from the District Court of the United States for the District of Columbia

Decided October 31, 1938

Leslie C. Garnett, Special Assistant to the Attorney General, David A. Pine, United States Attorney, and H. L. Underwood, Assistant United States Attorney, all of Washington, D. C., for appellants.

George P. Barse and Brice Clagett, both of Washington, D. C., for appellee.

Before GRONER, C. J., and MILLER and VINSON, JJ.

GRONER, C. J.: This is an appeal from a decree against appellants directing payment of the proceeds of certain bonds of the insolvent District National Bank which had been pledged by the bank to secure deposits of Canal Zone money-order funds. The bill alleges that the pledge was invalid, that the sale of the bonds and collection of the proceeds were illegal, and that such proceeds are a trust fund for the benefit of the creditors of the bank and as such recoverable from the defendants.

The answer asserts that the pledge was valid and that the bonds were lawfully in the possession of the Secretary of War.

The material facts shown here are in all respects identical with those in No. 7056, Inland Waterways Corp., et al. v. Hardee, Receiver (decided today), — F. 2d. —, and the disposition of that case controls this.

Affirmed.

Monday, October 31st, A. D. 1938

* * * * * * *

No. 7055. October Term, 1938

HARRY H. WOODRING, SECRETARY OF WAR, AND H. A. A. SMITH, GENERAL PURCHASING OFFICER AND CHIEF OF WASHINGTON OFFICE, PANAMA CANAL, APPELLANTS

vs.

JUSTUS S. WARDELL, RECEIVER, DISTRICT NATIONAL BANK OF WASHINGTON, D. C.

Appeal from the District Court of the United States for the District of Columbia. This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, affirmed.

Per Mr. Chief Justice Groner, October 31, 1938.

* * * * * * *

Designation of record

The Clerk will please prepare the transcript of record in connection with the application of Harry H. Woodring, Secretary of War, and H. A. A. Smith, General Purchasing Officer and Chief of Washington Office, Panama Canal, to the Supreme Court of the United States for a writ of certiorari in the above-entitled case, and include in the same the following:

1. The printed record of the proceedings in the lower court as filed in the Court of Appeals.

2. Minute entry showing argument of cause.
3. Opinion of the court.
4. Judgment of the court.
5. This designation.
6. The Clerk's certificate.

Filed Jan. 23, 1939.

ROBERT H. JACKSON,
Solicitor General; Counsel for Harry H. Woodring, Secretary of War, and H. A. A. Smith, General Purchasing Officer and Chief of Washington Office, Panama Canal.

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing printed and typewritten pages numbered from 1 to 31, inclusive, constitute a true copy of the transcript of record and proceedings as designated by counsel in the case of: Harry H. Woodring, Secretary of War, and H. A. A. Smith, General Purchasing Officer and Chief of Washington Office, Panama Canal, appellants vs. Justus S. Wardell, Receiver, District National Bank of Washington, D. C. No. 7055. October Term, 1938, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this Twenty-fourth day of January, A. D. 1939.

[SEAL] JOSEPH W. STEWART,
Clerk of the United States Court of Appeals for the District of Columbia.

U. S. GOVERNMENT PRINTING OFFICE: 1939

Supreme Court of the United States

Order allowing certiorari

Filed March 13, 1939

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Reed took no part in the consideration and decision of this application.

U. S. GOVERNMENT PRINTING OFFICE 1939

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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 628

HARRY H. WOODRING, SECRETARY OF WAR, AND H. A. A. SMITH, GENERAL PURCHASING OFFICER AND CHIEF OF WASHINGTON OFFICE, PANAMA CANAL, PETITIONERS

v.

JUSTUS S. WARDELL, RECEIVER, DISTRICT NATIONAL BANK OF WASHINGTON, D. C.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of Harry H. Woodring, Secretary of War, and H. A. A. Smith, General Purchasing Officer and Chief of Washington Office, Panama Canal, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above cause on October 31, 1938, which affirmed an order entered by the United States District Court for the District of Columbia striking parts of the petitioners'

answer and entering a decree against them *pro confesso.*

OPINIONS BELOW

The judgment of the District Court was entered without an opinion (R. 23–24). The opinion of the Court of Appeals for the District of Columbia (R. 27) has not yet been officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered October 31, 1938. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Funds of the Canal Zone, principally derived from its postal service, were deposited by the Secretary of War in the District National Bank, under an agreement securing the deposit. After insolvency of the bank the full amount of the deposit with interest was paid back from the proceeds of the security. The receiver, assailing the validity of the agreement to give security, brought this suit to recover that part of the deposit which exceeded the dividend paid general creditors. Two principal questions arise:

1. Is the United States an indispensable party defendant?

2. Under the circumstances of this case, was the giving of security by the national bank invalid?[1]

STATUTES AND REGULATION INVOLVED

The applicable portions of the statutes and regulation involved are set forth in Appendices A and B, respectively, *infra,* pp. 19–22, 23–26.

STATEMENT

On August 18, 1914, the then Secretary of War opened two deposit accounts in the District National Bank, one designated "Secretary of War, Canal Zone Funds, Call Account," and the other "Secretary of War, Canal Zone Funds, Checking Account" (R. 2–3). Those deposits were made pursuant to a contract of the same date entered into between the then Secretary of War and the bank (R. 8–11).

The contract provided, in effect, that the bank would deposit with the General Purchasing Officer of the Panama Canal bonds of a sum not less at any time than the amount of moneys and funds deposited under the agreement (R. 10). Those bonds were deposited in the vaults of the American Security & Trust Company (R. 10). The bank fur-

[1] For sake of simplicity, these questions are stated broadly, without detailing the sub-arguments (particularly as to question 2).

If certiorari is granted, it is proposed to consider also the question whether, if the deposit was invalid, under R. S. Sec. 5497, *infra*, p. 22, the bank became a trustee *ex maleficio* of the funds here involved.

ther undertook that if it failed to perform all provisions of the deposit agreement, the bonds were to become the property of the Secretary of War, and might be either retained by him or sold and the proceeds realized from such sale applied to the liquidation of any amount due under the contract (R. 10).

On March 5, 1933, the bank was closed by Proclamation of the President of the United States (R. 2, 13). It never reopened, and was found and determined to be insolvent by the Comptroller of the Currency, who appointed a conservator on March 14, 1933, and later, on November 6, 1933, a receiver was appointed (R. 2, 13). At the time of the suspension of the bank the credit balance in the Call Account amounted to $200,000, and the balance in the Checking Account amounted to $14,739.80 (R. 2, 3, 13). These deposits were almost entirely composed of deposit money order funds and money order funds received by the Canal Zone postal service (R. 14). The par value of the securities deposited to insure those deposits was at that time $274,200 (R. 3, 13).

After the closing of the bank, the securities pledged were sold to the Hamilton National Bank of Washington under an agreement by the Secretary of War and the General Purchasing Officer with the then conservator of the District National Bank, whereby the Secretary of War was paid from the proceeds of said sale $214,739.80, representing the credit balances on the two deposits, and

$3,535.37, representing interest on the deposits (R. 3, 13). The Comptroller of the Currency was aware of the proposed sale and sanctioned and approved it (R. 15–16).

On June 4, 1936, the receiver of the District National Bank brought suit against the Secretary of War to recover that part of the deposits which represented an amount in excess of the dividends paid to general creditors.[2] The petitioners filed an answer, and the respondent moved to strike certain portions of the answer and for the entry of a decree *pro confesso* (R. 22–23). The motion was granted, and judgment was entered against the petitioners (R. 23–24). On appeal, the Court of Appeals for the District of Columbia affirmed the judgment.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that a national bank could not lawfully pledge its assets to secure a deposit account

[2] A suit involving many of the issues here presented was commenced by a depositor of the Commercial National Bank of Washington, D. C. It was considered by the court below in *O'Connor* v. *Rhodes*, 79 F. (2d) 146, wherein it was held that assets pledged to the Fleet Corporation and to the Attorney General as Alien Property Custodian might be recovered. This Court granted certiorari, but limited the writ to the question of the right of a depositor to institute suit without prior demand being made to institute such suit on the receiver and the Comptroller of the Currency. That right was affirmed. *O'Connor* v. *Rhodes*, 297 U. S. 383. On remand, the District Court is holding the *Rhodes* case in abeyance pending the outcome of the present suit.

which was made up of moneys received from deposit money order accounts and postal money order accounts of the Panama Canal.

2. In holding that the Secretary of War had no authority to require the deposit of assets as such security.

3. In failing to hold that the laws applicable to postal money order accounts in the United States were also applicable to the postal accounts of the Canal Zone.

4. In failing to hold that the moneys in question were public moneys of the United States.

5. In failing to hold that the United States is an indispensable party to this suit.

6. In failing to hold that the bank became a trustee *ex maleficio* in respect to the funds here involved.

7. In affirming the judgment against the petitioners.

REASONS FOR GRANTING THE WRIT

The Secretary of War entered into an agreement with the District National Bank to secure deposits of Canal Zone funds. After the insolvency of the bank, the full amount of the deposit, with interest, was made available to the Secretary of War from the proceeds of the security. The lower court gave judgment for the receiver upon his suit to recover that part of the deposit which exceeded the dividend paid to general creditors. The two principal

questions, broadly stated, are whether the suit should have been dismissed because the United States is an indispensable party defendant, and whether the agreement to give security is valid.[3]

1. In holding the suit not one against the United States, and in failing to regard the United States as an indispensable party, the court below failed properly to apply the decisions of this Court.

The decree entered by the court below against the Secretary of War, based upon his official authority over the Canal Zone as delegate of the President (see 26 Op. A. G. 113),[4] in effect permitted

[3] If certiorari is granted, it is proposed also to argue that if the deposit was not valid, because the bank was not a designated depository, the bank became a trustee *ex maleficio* of the deposit, so that its repayment did not constitute a preference.

[4] The Act of April 28, 1904, 33 Stat. 429, authorized the President to take possession of the 10-mile strip, "the Canal Zone," and provided that until the expiration of the 58th Congress, all powers as well as the power to make rules and regulations necessary for the Government of the Canal Zone should be vested in such persons and exercised in such manner as the President may direct.

By letter of May 9, 1904, to the Secretary of War, the President directed that all governmental power in the Canal Zone, vested in the Isthmian Canal Commission, should be exercised under the supervision and direction of the Secretary of War, and authorized the Commission to make all needful rules and regulations for the government of the Zone, subject to the approval of the Secretary of War. In 1904 the Commission passed an act establishing a postal service, and in 1906, a resolution establishing a money order system.

Although the Act of April 28, 1904, read "until the expiration" of the Congress, Congress passed no further legislation

respondent successfully to maintain a suit against the United States. Cf. *Compagnie Generale T.* v. *Governor of the Panama Canal,* 90 F. (2d) 225 (C. C. A. 5th), certiorari denied, 302 U. S. 720. The case is one for the application of the doctrine requiring the dismissal for want of jurisdiction of suits brought against officers of the States or the United States, in their official capacity and not because of their individual or personal interest, seeking relief actually operative against the government they represent. *In re Ayers,* 123 U. S. 443, 489, 506.

The court below was not clear as to its reason for not applying the rule. The opinion in the companion case, *Inland Waterways Corp. et al.* v. *Hardee,* No. 629 (R. 106), states that the proceeds of the pledge do not belong to the United States and have not been covered into the Treasury, so that the Secretary of War, having participated in a conversion of the bank's assets, must restore the sum received from the proceeds of the sale of the bonds "just as any other person who had participated in a preferential transfer would be compelled

for eight years. In the meanwhile, according to 20 Op. A. G. 133, the President was authorized to discharge the obligation of the United States under the treaty with Panama to provide a government for the Territory. The Act of August 24, 1912 (Panama Canal Act), Section 2, 48 U. S. C., Sec. 1309, ratified and confirmed all regulations, etc., promulgated within the Canal Zone by order of the President.

to respond" (No. 629, R. 119). If this language is taken to hold the Secretary personally liable for the tort committed at the time of the transfer of the pledged assets, the decision is manifestly erroneous, since Secretary Woodring did not participate in the alleged preference and was substituted as party defendant in the place of George H. Dern, deceased, after the present proceedings had been begun (R. 12).[5]

However, in the subsequent opinion in *Cummings* v. *Hardee,* January 23, 1939, *infra,* Appendix C, p. 27, the court dismissed the suit brought by the receiver to recover preferential payments made by the Commercial National Bank to the Attorney General as successor in interest to the Alien Property Custodian, on the ground that the defendant was not subject to any personal liability and that the money had been covered into the Treasury. The court distinguished the present case as involving moneys not covered into the Treasury and therefore concerned with the recovery of a specific *res* unlawfully in the custody of an official of the Government. The court apparently conceived that since the Secretary of War had control of the fund, he could be sued "in his official capacity in a possessory action."

[5] At the same time petitioner H. A. A. Smith, having succeeded the decedent Arthur L. Flint as General Purchasing Officer and Chief of Washington office, the Panama Canal, was substituted in his stead (R. 12).

We submit that the principles stated by this Court show that the United States is an indispensable party. This may be seen simply from the fact that the judgment below takes the money not from petitioners personally but from the government they serve. *In re Ayers, supra; Oregon* v. *Hitchcock,* 202 U. S. 60, 68, 69.

The court below appreciates the doctrine of sovereign immunity where the money is covered into the Treasury. *Cummings* v. *Hardee, infra,* p. 27. The question may be more clear in such a case (*Belknap* v. *Schild,* 161 U. S. 10, 18; *Louisiana* v. *Jumel,* 107 U. S. 711), but the sovereign interest is not non-existent merely because the official receiving the money has not covered it into the Treasury. Though an officer has custody of property, the courts cannot compel him to surrender it in a proceeding in which the United States is not a party, if the property is in the possession of the United States as owner (*United States ex rel. Goldberg* v. *Daniels,* 231 U. S. 218), or if the interests of the United States will be affected (see *Belknap* v. *Schild, supra; International Postal Supply Co.* v. *Bruce,* 194 U. S. 601). Its interests are affected here, although the fund represents moneys received by the Canal Zone postal service from private parties. In the first place, Congress has authorized the use of revenue derived from the Canal Zone postal service to defray the expenses of

operating that service.[6] Moreover, the faith of the United States has been solemnly pledged to the payment of deposits,[7] and the United States may be an indispensable party in a suit brought nominally against its officers, although it has no direct pecuniary concern, and is involved as a guardian or trustee. *Morrison* v. *Work*, 266 U. S. 481.

The judgment below cannot be supported as a "possessory action." *United States* v. *Lee*, 106 U. S. 196, held that the putative owner of real estate could bring suit against governmental officers claiming possession under the United States. But such a suit is grounded against the individual official as a trespasser (see *Cunningham* v. *Macon, etc., R. Co.*, 109 U. S. 446, 452), and cannot conclude the United States or adjudicate its title. *Stanley* v. *Schwalby*, 162 U. S. 255, 270, 271. In the present case, the judgment below compelling the payment of the money would operate effectively to dispose of any interest of the United States.

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[6] Act of February 16, 1933, Sec. 1, c. 89, 47 Stat. 812 (48 U. S. C., Sec. 1323a), *infra*, pp. 20, 21.

[7] The Act of February 16, 1933, *supra*, note 6, provides that the Canal Zone Postal Service shall be governed by such rules of the U. S. Postal Service as apply to conditions in the Canal Zone. And under the Act of June 25, 1910, Sec. 16, c. 386, 36 Stat. 814 (39 U. S. C. Sec. 766) the "faith of the United States is solemnly pledged to the payment of the deposits made in postal savings depository offices * * *."

Nor is the judgment below supported by the decree in *Osborn* v. *United States Bank,* 9 Wheat. 738, for the restoration of money taken from the Bank. Notwithstanding an injunction restraining the auditor of Ohio and his agents from enforcing a tax statute against the Bank, $100,000 in specie and notes was forcibly seized by them, turned over to the state treasurer, and turned over by him, at least to the extent of $98,000, to his successor in office. In ordering the return of this $98,000, plus the payment of $2,000 by the collector himself, the Court pointed out that it was not entertaining a suit against the State but was merely enforcing the personal liability of the defendant officers, that the collectors were incontestably liable as trespassers, and that, conceding that the original injunction was not properly awarded, the successor in office to the treasurer, though not an original wrongdoer, was responsible in detinue for the money taken without authority and detained by him "in a specific form," i. e., left untouched in a trunk (pp. 868, 869).

This aspect of the case seems to have been disapproved by implication in *Cunningham* v. *Macon, etc., R. Co.,* 109 U. S. 446, where the Court explained the *Osborn* case on the ground that the money had been turned over in violation of the preliminary injunction (p. 455). This Court has apparently not again compelled an officer not subject to any personal liability as trespasser to perform the affirmative act of surrendering moneys

under his control as a governmental official. If the *Osborn* decision has any vitality in this regard, it is confined to the peculiar facts of that case upon which the Court relied heavily, especially the fact that the case involved particular specie and notes which were kept separate from all other property, were completely identifiable, and were thus susceptible of being the subject of an action in detinue. The present case does not represent the vindication of a right to specific real or personal property. No pretense is made of requiring the delivery of the precise property originally transferred to the Secretary of War.[8] The court below applied general trust concepts and considered petitioner Woodring as some sort of successor trustee of a constructive trust. The tracing of the *res*, if that was attempted,[9] was merely the means of determining the amount of the liability for a breach of trust. This remedy does not come within the narrow exception permitting a remedy by way of recapture of money from a governmental official. Cf. *Haskins Bros. & Co.* v. *Morgenthau*, 85 F. (2d) 677, 683, certiorari denied, 299 U. S. 588.

[8] The situation is even clearer in the companion case of *Inland Waterways Corp. et al.* v. *Hardee*, No. 629. There the bank yielded up the bonds pledged (R. 7). In their answer, petitioners Woodring and Smith denied that they or either of them "so hold said bonds." (R. 83.) The judgment merely required the payment of $368,327.71, subject to credits, with interest (R. 100).

[9] The judgment was simply for $207,361.41, subject to credits, with specified interest (R. 23).

2 a. In holding invalid the securing of the Canal Zone's deposit the court below decided in a way contrary to the long-settled administrative practice, an important question of banking law, affecting many agencies, which ought to be decided by this Court. It is submitted that the deposits made in this case are authorized under R. S., Sec. 5153, 12 U. S. C., Sec. 90, *infra,* p. 19, as deposits of "public money." [10] The court below construed this section to have limited application to deposits made by the Secretary of the Treasury or his agent. In *Marion* v. *Sneeden,* 291 U. S. 262, 267, the Court was primarily concerned with the lack of power of national banks generally to secure deposits, and merely noted in dictum that there was an exception as to deposits made by the Secretary of the Treasury, an exception not involved or precisely defined in that case.

The narrow interpretation of R. S., Sec. 5153 by the court below would seem to defeat the Congressional intent to protect all deposits of public moneys. Statutes protecting public moneys are to be liberally construed. *Beaston* v. *Farmers Bank,* 12 Pet. 102, 134. In this connection it may be noted that

[10] The admission in the answer (R. 20) that they are not "public moneys" was merely an affirmation that they had not been covered into the Treasury and were not under the control of the Secretary of the Treasury.

The funds of the other petitioners involved in the companion case *Inland Waterways Corp.* v. *Hardee,* were alleged to be public moneys (No. 629, R. 38, 39, 79).

the National Banking Act of 1864 was, in effect, the last of the legal tender Acts, and passed primarily for the benefit of the United States and not of the banks themselves or its depositors. Congressional Globe, 38th Cong., 1st Sess., pp. 2125, 2206. The public interest in the safekeeping of public funds is superior to the interest of private depositors. The provisions in R. S., Sec. 5153 are directory, not mandatory, and if the spirit and intent of the statute are carried out, it cannot nullify the entire transaction that the deposits and pledge were not "personally" made by the Secretary of the Treasury.

The decision below reverses a long standing administrative practice, initiated in respect of Panama Canal funds, January 19, 1909, by a contract, superseded by a contract of May 11, 1910, between the Secretary of War and the Commercial National Bank. The action of the Secretary of War in negotiating contracts for the giving of security to safeguard deposits was the subject of correspondence between both the Secretary of War and the Panama Canal, and the Treasury Department, and was approved by the Secretary of the Treasury. The entering into the contract with the District National Bank was specifically recommended by the Comptroller of the Currency and the Secretary of the Treasury (R. 15). This practice was acted upon and adopted in respect of deposits of funds administered by other departments,

without challenge for more than twenty years (R. 15).

In addition to its force as administrative construction, the foregoing suggests that even if 12 U. S. C., Sec. 90 refers to the personal participation of the Secretary, his approval of the contracts under which the Canal Zone funds are deposited constitutes a compliance with that section.

b. In addition, the court below erred in failing to find a specific authority in the Secretary of War to enter into a contract requiring the District National Bank to secure deposits of Panama Canal money, particularly as applied to the deposits in this case, which were almost entirely composed of money-order funds and deposit money-order funds received by the Canal Zone postal service [11] (R. 14).

By the Act of August 21, 1916, Congress provided that "the interest received from the Canal Zone money-order funds deposited in banks under Canal Zone regulations shall be available to pay the interest on deposit money orders" (39 Stat. 528). The court below agreed (No. 629, R. 117) that this

[11] Similar funds in the United States postal service may be deposited in a national bank, if that bank gives adequate security to insure the safety of the deposit. Act of June 25, 1910, Sec. 9, 36 Stat. 814, as amended, 39 U. S. C., Sec. 759. By analogy this right extends to the Secretary of War, for since 1904 by order and regulation the Canal Zone postal service has been made subject to rules of the United States postal service not inapplicable to conditions in the Canal Zone, a provision reenacted in Sec. 1 of the Act of February 16, 1933, *infra*, p. 20.

was an approval of the depositing of money-order funds under regulations, but was unable to discover regulations in this respect in existence at that time. The court wholly failed to consider the effect of the regulation prescribed by Circular No. 660–2, of April 1, 1914, Appendix B, *infra,* p. 23.[12] With respect specifically to money order, postal savings bank and other designated funds, article 3 of the regulation provides that the Collector "shall deposit same in depositories under the contracts entered into by the Secretary of War." The reference obviously included the contract of May 11, 1910, entered into between the Secretary of War and the Commercial National Bank, providing for the securing of deposits (R. 17, No. 629). It seems plain that this securing of the deposit was approved by the regulation and therefore by the Act of August 21, 1916. Further Congressional approval may be implied from the fact that it was informed of the specific fact that bonds secured the deposits in the Commercial National Bank and District National Bank.[13]

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[12] This is not contained in the record, but was handed to the court upon the argument and was therefore available for consideration. *Minnesota* v. *United States*, No. 73, this Term, decided January 3, 1939.

[13] See particularly Isthmian Canal Commission, Annual Report for 1915, pp. 278, 279; and see also Report for 1913, p. 415; Report for 1914, p. 328; Letter from Mr. Baker, Secretary of War, to Speaker of the House of Representatives, September 12, 1919, printed in H. Rep. No. 1083, 67th Cong., 2d Sess., p. 15.

3. It is appreciated that in *O'Connor* v. *Rhodes*, 79 F. (2d) 146 (App. D. C.), affirmed, 297 U. S. 383, involving some of the questions here discussed, certiorari was limited to the question of the standing of the stockholder of the insolvent bank to bring suit to set aside a preference. But that case arose on motion to dismiss, and this Court may have considered that the questions of sovereign immunity and validity of the pledge could more appropriately be considered upon final decree (see *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U. S. 251, 258).

The objection that the United States is an indispensable party is not only jurisdictional but it relates to a matter in which the court below has departed from the principles stated by this Court. And the validity *vel non* of the giving of security for a deposit, involving as it does the right of a public officer to protect moneys coming into his possession in the course of official business presents a question having a far-reaching effect upon the method by which various governmental agencies conduct their financial affairs.

CONCLUSION

For the reasons stated, it is respectfully submitted that a writ of certiorari should be granted.

ROBERT H. JACKSON,
Solicitor General.

JANUARY 1939.

APPENDIX A

R. S., Sec. 5153 (12 U. S. C., Sec. 90):

All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: *Provided,* That the Secretary shall, on or before the 1st of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: *Provided,* That the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections.

Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State.

Act of August 21, 1916, c. 371, 39 Stat. 528 (48 U. S. C., Secs. 1324, 1325):

SEC. 6. That deposit money orders issued in the Canal Zone in lieu of postal savings certificates in accordance with the rules and regulations heretofore established by the President, or that may hereafter be established by him, shall bear interest at a rate not exceeding two per centum per annum.[1]

SEC. 7. That the interest received from the Canal Zone money-order funds deposited in banks under Canal Zone regulations shall be available to pay the interest on deposit money orders authorized by the preceding section. Such interest shall also be available to pay any losses which are chargeable to the Canal Zone postal service.

Act of February 16, 1933, c. 89, 47 Stat. 812 (48 U. S. C., Sec. 1323a):

SEC. 1. The postal service of the Canal Zone shall be governed by such of the laws, rules, and regulations of the Postal Service of the United States as are not inapplicable to the conditions existing in the Canal Zone, and the Governor of the Panama Canal is authorized to establish new post offices or discontinue those already established, to provide such rules and regulations as are nec-

[1] Three per centum by amendatory Act of September 21, 1922, c. 370, sec. 11, 48 U. S. Code 1324.

essary for the operation of the service, to appoint the personnel thereof, and to prescribe the postage stamps and other stamped paper which shall be used in such service: *Provided, however,* That the expenses of operating the Canal Zone postal service shall be defrayed, so far as possible, from the revenue derived therefrom, the use of which for that purpose is hereby authorized.

Act of June 25, 1910, c. 386, 36 Stat. 814, as amended (39 U. S. C., Secs. 759, 766):

SEC. 9. Postal savings funds received under the provisions of this chapter shall be deposited in solvent banks, whether organized under national or State laws, and whether member banks or not of the Federal reserve system, being subject to national or State supervision and examination, and the sums deposited shall bear interest at the rate of not less than 2¼ per centum per annum, which rate shall be uniform throughout the United States and Territories thereof; but 5 per centum of such funds shall be withdrawn by the board of trustees and kept with the Treasurer of the United States, who shall be treasurer of the board of trustees, in lawful money as a reserve. The board of trustees shall take from such banks such security in public bonds or other securities, authorized by Act of Congress or supported by the taxing power, as the board may prescribe, approve, and deem sufficient and necessary to insure the safety and prompt payment of such deposits on demand: *Provided,* That no such security shall be required in case of such part of the deposits as are insured under section 264 of Title 12. The funds received at the postal savings depository offices in each city, town,

village, and other locality shall be deposited in banks located therein (substantially in proportion to the capital and surplus of each such bank) willing to receive such deposits under the terms of this chapter and the regulations made by authority thereof. * * *

SEC. 16. The faith of the United States is solemnly pledged to the payment of the deposits made in postal savings depository offices, with accrued interest thereon as herein provided.

R. S., Sec. 5497 (Criminal Code, Sec. 96; 18 U. S. C., Sec. 182):

Every banker, broker, or other person not an authorized depositary of public moneys, who shall knowingly receive from any disbursing officer, or collector of internal revenue, or other agent of the United States, any public money on deposit, or by way of loan or accommodation, with or without interest, or otherwise than in payment of a debt against the United States, or shall use, transfer, convert, appropriate, or apply any portion of the public money for any purpose not prescribed by law; and every president, cashier, teller, director, or other officer of any bank or banking association who shall violate any provision of this section is guilty of embezzlement of the public money so deposited, loaned, transferred, used, converted, appropriated, or applied, and shall be fined not more than the amount embezzled, or imprisoned not more than ten years, or both.

APPENDIX B

The Panama Canal

OFFICE OF THE GOVERNOR

Culebra, C. Z., *April 1, 1914.*

Circular No. 660–2.

Accounting Department

AUDITOR OF THE PANAMA CANAL

1. The Auditor of The Panama Canal is charged with the immediate direction and control of accounting, and the auditing and settlement of claims for The Panama Canal and Canal Zone and for the Commissary Department of The Panama Railroad on the Isthmus. He has supervision and control over the acceptance of bonds, the methods of keeping records and accounts of receipts and disbursements of moneys received by all officers and agents of The Panama Canal and Canal Zone by virtue of their offices or positions, and the methods of safeguarding such moneys. He shall prescribe all forms for recording the receipt and disbursement of moneys and property and all forms necessary for use in accounting for money and property, except as otherwise prescribed in accordance with law. He is authorized, and it shall be his duty, to examine the books, contracts, records, and accounts of money and property in the possession of all

officers and agents of The Panama Canal and Canal Zone, and of the Commissary Department of the Panama Railroad on the Isthmus. He shall perform all the duties heretofore assigned to the Examiner of Accounts or to the Auditor of the Canal Zone Government, and the additional duties prescribed by the Executive Order of January 27, 1914.

DISBURSEMENTS—PAYMASTER

2. The Paymaster is charged with the payment on the Isthmus of all moneys appropriated for The Panama Canal and expendable under the direction of the Governor. The Paymaster will make payments only on vouchers or pay rolls, time vouchers or pay receipts which have been examined and audited by the Auditor. All collections made by the Paymaster on the pay rolls shall be paid by him to the Collector upon the certificate of the Auditor specifying the amount and the source from which derived, except refundments of overpayments and amounts due The Panama Railroad Company for supplies or services rendered employees, and except other deductions authorized to be made and to be paid to other branches of the service, to contractors or other persons. All other duties performed by the Disbursing Officer of the Isthmian Canal Commission prior to April 1, 1914, will be performed by the Collector.

RECEIPTS—COLLECTOR

3. The Collector shall perform all duties heretofore performed by the Treasurer of the Canal Zone and, in addition, shall collect or receive all amounts

due The Panama Canal and Canal Zone. He shall transfer all cash received by him and not required for the performance of his duties, to the Paymaster. For the funds of The Panama Canal, he shall take the Paymaster's receipts; for Canal Zone, money order, postal savings bank, clubhouse, and other trust funds and security deposits, he shall take the draft of the Paymaster on the Treasurer of the United States and shall deposit same in depositories under the contracts entered into by the Secretary of War. He shall have such number of deputies or assistants as may be assigned to him. All moneys, records, and papers of the Treasurer of the Canal Zone, and all moneys, records, and papers of the Collector of Revenues and his deputies, insofar as they relate to the collection of moneys, shall be transferred to the Collector of The Panama Canal.

4. The Collector will render an account for all public moneys of the United States received by him to the Auditor for the War Department, through the Auditor of The Panama Canal. The account will be forwarded to the Auditor of The Panama Canal within ten days after the close of each month, and will be forwarded by the Auditor of The Panama Canal to the Auditor for the War Department within ten days thereafter.

5. All amounts due The Panama Canal or Canal Zone will be collected by the Collector or his deputies whenever practicable. Bonded employees of the various departments and divisions designated by the Auditor may make collections for minor services or sales. In the performance of their duties in connection with receiving, handling, and

refunding cash, such employees shall be subject to the direction of the Auditor. Such bonded employees shall issue receipts in triplicate, giving the original to the party making deposit and sending the duplicate to the Auditor.

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APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 7127

HOMER S. CUMMINGS, ATTORNEY GENERAL OF THE UNITED STATES, SUCCESSOR IN INTEREST TO ALIEN PROPERTY CUSTODIAN OF THE UNITED STATES, APPELLANT

v.

CARY A. HARDEE, RECEIVER OF THE COMMERCIAL NATIONAL BANK OF WASHINGTON, D. C., APPELLEE

Appeal from the District Court of the United States for the District of Columbia

(*Argued December 8, 1938. Decided January 23, 1939*)

Before GRONER, C. J., and MILLER and VINSON, JJ.

GRONER, C. J.: This is an appeal by Homer S. Cummings, Attorney General of the United States, as successor in interest to the Alien Property Custodian, from a final decree and order of the District Court granting the plaintiff's (appellee's) motion to strike certain parts of defendant's (appellant's)

answer and entering judgment *pro confesso* for the plaintiff. The suit was instituted by the receiver of the Commercial National Bank of Washington, D. C., against the Attorney General and a number of other defendants. In each case decree went for the receiver. The appeals of the defendants Inland Waterways Corporation, United States Shipping Board Merchant Fleet Corporation, Harry H. Woodring, Secretary of War, and others, were heard together and decided on a separate record by this court October 31, 1938.[1] The decrees were affirmed. In each case, including the present one, the purpose of the suit was to recover preferential payments made by the bank after insolvency. The bill alleged that each defendant had deposited sums of money with the bank, that the bank had unlawfully pledged part of its assets to each defendant to secure the deposits; that the bank thereafter became insolvent and a receiver was appointed to administer its assets, that the receiver, acting under mistake of law, redeemed part of the pledged assets at their full value; and that defendants sold the remaining part to satisfy the bank's indebtedness in full. The prayer of the bill in this case is that the defendant be declared trustee for the benefit of the receiver for the sums received from the sale and that the receiver have a decree for the amount thereof, with interest.

Admittedly the deposits were to the account of the Alien Property Custodian and consisted of money derived from two per cent. deductions from alien property, authorized by statute to be made

[1] *Inland Waterways Corporation, et al.* v. *Hardee, Receiver*, No. 7056, — F. 2d —.

upon return of the property to former enemy owners.[2]

The final decree of the District Court gave judgment against Homer S. Cummings,[3] Attorney General, as successor to the Alien Property Custodian, for the sum of $88,556.56, with interest from December 1, 1937, until paid, representing a balance of principal in the sum of $64,852.85 after deducting dividends at the rate paid unsecured creditors, and interest thereon in the sum of $23,703.71.

Nine grounds of error are relied on, but in the view we take of the case it is necessary to discuss only one of them.

The answer of the Attorney General alleged that the United States were the sole and absolute owners of the moneys deposited by the Alien Property Custodians in the bank and that the moneys were public moneys; that the moneys received from the sale of the pledged securities were when received deposited in the Treasury of the United States and credited to "Secretary's Special Deposit Account No. 8" and commingled with other funds of the United States; that this account is subject only to the check of the Secretary of the Treasury; that the Attorney General has not now and never has had the physical custody or possession of or any interest in the moneys received by the former custodian from the sale of the pledged securities. On these grounds the Attorney General insists that if the decree is to be considered one against him in his individual capacity, it is erroneous because he

[2] Trading With the Enemy Act, sec. 24, 11 F. C. A., Tit. 50, sec. 24 (25).

[3] Mr. Cummings resigned January 2, 1939.

admittedly had no individual interest in the subject matter and, if it is to be considered one against him in his official capacity, it is invalid because not authorized under any of the provisions of the Trading With the Enemy Act, as amended.

We think the first ground may be eliminated, for obviously the decree is only against the Attorney General as Acting Alien Property Custodian, and the judgment is in effect to require him to exercise his official control over alien property funds in the Treasury of the United States. The case in this aspect differs from the cases decided in October in at least one major respect. In the cases of the Fleet Corporation and Inland Waterways Corporation, although the deposits were moneys of the United States and the proceeds of the pledge had been covered into the Treasury, they were, as corporations, the actual wrongdoers, suable in their individual capacities and therefore liable to judgment for conversion of the illegal pledge; and in the case against the Secretary of War, as custodian of the postal funds of the Panama Canal Zone, the proceeds of the pledged securities were not moneys of the United States and had not been covered into the Treasury but were still in his possession and control, and the suit was therefore for the recovery of a specific *res* unlawfully in the custody of an official of the Government. In the present suit, as we have seen, not only is it alleged that the deposits in the bank were moneys of the United States, but the proceeds of the securities pledged to secure the deposits were deposited in the Treasury of the United States and commingled with the funds of the United States, and in this aspect the question

for decision is whether the District Court had jurisdiction to enter a decree for the restoration of the money—conceding the contract for deposit-security to have been illegal—without the consent of the United States to be sued. We think the answer to the question is to be found in our decision in *Haskins Bros. Co.* v. *Morgenthau,* 85 F. 2d, 677, 66 App. D. C. 178, cert. den., 299 U. S. 588. It is quite true that in the case of *O'Connor* v. *Rhodes,* 79 F. 2d, 146, 65 App. D. C. 21—which was a previous suit brought by a depositor of the Commercial National Bank against the Attorney General as Alien Property Custodian and a number of other defendants to recover on these same causes of action—we said on an appeal from a decree overruling defendant's motion to dismiss the bill:

> The occasion for naming the Attorney General as one of the defendants arose out of the fact that by an Executive order he became the successor in interest to the Alien Property Custodian. The bill alleges that the Custodian obtained from the receiver of the bank a sum of money in excess of that to which he was legally entitled, and the bill further alleges that the Attorney General has received and controls the money so illegally obtained by his predecessor. As we have already pointed out, the fund deposited in the bank by the Alien Property Custodian consisted of money made up by the deduction of 2 per cent. of the value of property and money of alien enemies under the general provisions of the Trading with the Enemy Act (50 U. S. C. A. Appendix, Sec. 1 et seq.). We have had occasion to notice the conditions under which the fund was accumulated by the Custodian, and we

> have always assumed that the fund was a guaranty fund to cover the expense of administration and that the balance after the payment of expenses, if any, would be returned to the several trusts and distributed to the owners. It is a fund exclusively under the control of the Acting Custodian. It is not money of the United States paid into the Treasury of the United States.

Hence we did not consider the suit as one against the United States. That case was subsequently dismissed, and the present suit for the same purpose was instituted by the receiver. But it should be observed that our former decision was based upon the facts appearing in the bill of complaint in that suit, and these facts showed that the fund being sued for—the proceeds of the pledge—was then a fund exclusively under the control of the Attorney General; that it was not money of the United States; was held by the Attorney General; and had not been covered into the Treasury of the United States and commingled with the moneys of the United States. The contrary appears on the appeal in the present suit. We do not, therefore, regard *O'Connor* v. *Rhodes* as establishing the law in this case or, in view of the circumstances, as controlling.

On the facts now shown, we think that the money deposited in the bank was unquestionably money of the United States, and that the judgment in this case can be satisfied only by payment of money out of the United States Treasury. As to the first proposition we did, as in the *O'Connor* case, express a contrary view in *Deutsche Bank* v. *Cummings*, 83 F. 2d 554, 65 App. D. C. 297. There we

said that legislation on the seizure of alien property, passed in the exercise of the war power of Congress, indicated no purpose of confiscating to the use of the United States enemy property found within the country; that, while the power to confiscate existed, it had never been exercised; and that, until exercised, the seizure and retention of alien property created only a trusteeship and did not change title. We thought we were justified in this conclusion by the language of the statutes and the declarations of the Executive Departments on the subject of confiscation, but on appeal to the Supreme Court (300 U. S. 115) our views were disapproved, and it was held that alien enemy owners were divested of every right in respect of money and property seized and held by the custodian during the war and that the title to the same upon seizure became absolute in the United States. In this view it follows (in the light of the facts here) that the suit to recover the proceeds of the pledge made to secure the deposit is in substance a suit against the United States. *Cummings* v. *Societe Suisse Pour Valeurs De Metaux*, 85 F. 2d 287, 66 App. D. C. 121; *Cummings* v. *Deutsche Bank*, 300 U. S. 115; *Banco Mexicano* v. *Deutsche Bank*, 263 U. S. 591, 603. Here, as we have pointed out, the deposits were made by a former Alien Property Custodian, and the bonds pledged as security had been held by a former custodian and converted by him into money which he deposited in the Treasury. The Attorney General did not demand the pledge, did not receive the security, and did not participate in the deposit of the proceeds of the pledged assets in the Treasury of the United States.

But the receiver insists that this is of no consequence since, as he claims, the proceeds of the pledge—though in the Treasury—are earmarked for "the account of the Attorney General, Alien Property Bureau", and are therefore subject to his order; and that, since the Alien Property Custodian has authority to pay the necessary expenses incurred by him in the general administration of his office, and since the original deposit in the bank was made in connection with the general administration of the Alien Property Bureau, the pledge of securities was correlative to the deposits; and that the sale of the securities and retention of the proceeds was an incident to general administration; and that consequently, since the money was wrongfully received, the repayment thereof is an obligation incurred by the Alien Property Custodian in the administration of his office, and the Attorney General, as his successor, has the power and duty to make repayment by withdrawal of a sufficient sum from the Treasury. But we think this conclusion by no means follows. Congress has specifically prohibited the payment of alien property money deposited in the Treasury except pursuant to the provisions of the Trading With the Enemy Act, as amended.[4]

[4] SEC. 7 (c) * * * The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property

Section 7 of the Act gave the Alien Property Custodian authority to seize enemy property and, as we have pointed out, the seizure when lawfully

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Custodian or by the Treasurer of the United States (40 Stat. 1020).

SEC. 9 (a). That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the pay-

made transferred title absolutely to the United States. Section 9 (a), as supplemented by Section 30 (11 F. C. A., Tit. 50, sec. 24 (31)), gave to a nonenemy owner of property seized the right to recover it by suit in a federal court, and Section 7 (c) denied all other remedy. The Act, taken as

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ment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated. (42 Stat. 1511.)

SEC. 30. Any money or other property returnable under subsection (b) or (n) of section 9 shall, at any time prior to such return, be subject to attachment in accordance with the provisions of the code of law for the District of Columbia, as amended, relating to attachments in suits at law and to attachments for the enforcement of judgments at law and decrees in equity, but any writ of attachment or garnishment issuing in any such suit, or for the enforcement of any judgment or decree, shall be served only upon the Alien Property Custodian, who shall for the purposes of this section be considered as holding credits in favor of the person entitled to such return to the extent of the value of the money or other property so returnable. Nothing in this section shall be construed as authorizing the taking of actual possession, by any officer of any court, or any money or other property held by the Alien Property Custodian or by the Treasurer of the United States. (Oct. 6, 1917, c. 106, sec. 30, as added Mar. 10, 1928, c. 167, sec. 15, 45 Stat. 275.)

a whole, establishes a definite code in relation to seizure of enemy property.[5] As construed by the Supreme Court, its effect was by the seizure to transfer title from the alien to the United States, with a reservation, however, that if the seizure was erroneous and the property was not enemy-owned, its recovery could be secured in a suit brought by the owner against the Alien Property Custodian or the Treasurer as agents of the United States,—but forbidding a suit brought to recover the seized property or its proceeds in any other circumstances. If this is a correct construction of the Act, it is evident that consent of the United States to be sued in the circumstances we are considering is wholly lacking, for this is not a suit brought by a non-enemy owner to recover possession of property seized in the belief that it was enemy-owned, and in that case alone has Congress consented that the United States may be sued as to such seized property. This is a suit to recover the proceeds of securities unlawfully pledged to the custodian to secure deposits of money of the United States. These proceeds are no longer in the hands of the custodian but have been covered into the Treasury in accordance with the positive mandate of the Act,[6] and, since the United States have not consented to be sued except in accordance with Section 9 of the Act, we know of no way in which a suit

[5] All the statutes which relate to the seizure of alien property and its administration by the custodian are collected in 11 F. C. A., Tit. 50, sec. 24 (1), *et seq.* The original *Trading with the Enemy Act*, 40 Stat. 411 (1917), was amended from time to time and was supplemented by the *Settlement of War Claims Act*, 45 Stat. 254 (1928).

[6] Sec. 12, 11 F. C. A., Tit. 50, sec. 24 (12).

under the general equity jurisdiction of the court for their recovery can be maintained. *Crone* v. *Sutherland*, 63 F. 2d 895, 62 App. D. C. 16. If this were a suit for mandamus against the Attorney General to require him to withdraw the funds from the Treasury and restore them to the bank, it would not be sustainable for the reason that Congress has not conferred authority on the Attorney General to withdraw them, for the asserted right to the use of money in the payment of the expenses of administration is a far cry from the right to withdraw it in satisfaction of a judgment for a tortious conversion. *Reeside* v. *Walker*, 11 How. 271, 290. No principle is better established than that moneys in the Treasury can be withdrawn only by a Congressional appropriation. Referring to this in the *Haskins Bros.* case, *supra*, we said that the duties of the Secretary of the Treasury and the Treasurer are to receive and preserve the public money and not to disburse it except conformably to law; that as officers of the United States they have no right or estate in the public money, whether earmarked as a special fund or as part of the general fund; that they are in effect mandataries of a limited and defined commission. In that case, as in this, it was alleged that the earmarked fund in the Treasury was money belonging to the claimant, but in that case, as in this, it was in the Treasury and not in the hands of the officer who it was claimed had illegally exacted it. We answered this by saying that to require its withdrawal from the Treasury would be to usurp the legislative function of appropriation and that this could not be done.

Nor can the suit be maintained against the Attorney General, either personally or in his official capacity, on a showing that a predecessor in office had illegally collected the money and placed it in the Treasury. The Attorney General is not shown to have done anything in his personal capacity in relation to the matters out of which this suit arose. The events all occurred in the administration of a predecessor. The Attorney General did not receive the fund in the first instances and in this view he can not be charged personally in an action for money had and received. *Smietanka* v. *Indiana S. Co.*, 257 U. S. 1. Nor has he now possession of the fund, and so can not be sued in his official capacity in a possessory action, *Haskins Bros. Co.* v. *Morgenthau, supra,* at p. 683; and since under the provisions of the Trading With the Enemy Act he has no authority to withdraw the fund except for specified purposes named in the Act and there is no other law permitting its withdrawal, he can not be sued at all, for such a suit is in effect a suit against the United States. *Haskins Bros. Co.* v. *Morgenthau, supra.* It is obvious, therefore, that—without considering whether the bank has a right of action against the former Alien Property Custodian because it has been injured by his wrongful act—the present suit is necessarily one against the United States, and in that aspect it can not be maintained against an agent of the United States so long as he is acting as agent. The surveyor of the highways, who is a servant of the inhabitants of the county, is not responsible for the nonperformance of their duties or for the negligence of their servants though he is the person who acts for them, even though the inhabitants of the county can not themselves be

sued because they are not a body corporate. It is, therefore, in our opinion of no consequence whether the act of the former Alien Property Custodian was or was not lawful. The fact that he collected the proceeds of the pledged bonds and deposited these in the Treasury fixes the status of the money and renders the Attorney General impotent to withdraw it and disburse it unless and until directed to do so by an Act of Congress or until the United States shall submit to be sued to determine its disposition.

In our view the decision and decree of the lower court are wrong and should be, and are, reversed.

Reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 5

HARRY H. WOODRING, SECRETARY OF WAR, AND H. A. A. SMITH, GENERAL PURCHASING OFFICER AND CHIEF OF WASHINGTON OFFICE, PANAMA CANAL,[1] PETITIONERS

v.

USTUS S. WARDELL, RECEIVER, DISTRICT NATIONAL BANK OF WASHINGTON, D. C.[2]

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The judgment of the District Court was entered hout an opinion (R. 23–24). The opinion of the rt of Appeals for the District of Columbia 27–28) is reported in 100 F. (2d) 690.

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ubstituted for George H. Dern and Arthur L. Flint, ctively, defendants in the original action (R. 12).
ubstituted for Norman R. Hamilton, plaintiff in the al action (R. 11).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on October 31, 1938 (R. 28). The petition for a writ of certiorari was filed on January 31, 1939, and granted on March 13, 1939 (R. 31). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Funds of the Canal Zone, principally derived from its postal service, were deposited by the Secretary of War in the District National Bank, under an agreement securing the deposit. After insolvency of the bank the full amount of the deposit with interest was repaid from the proceeds of the security. The receiver brought this suit to recover that part of the deposit which exceeded the dividend paid general creditors. Two questions arise:

1. Is the United States an indispensable party defendant?

2. In the circumstances of this case, was the agreement giving security by the national bank invalid?

STATUTES INVOLVED

The applicable portions of the statutes and regulations involved are set forth in the separately printed Appendix to Nos. 5 and 6.

STATEMENT

This case is before this Court upon the pleadings, consisting of an amended bill of complaint (R. 1–11); an answer (R. 12–22), and a motion to strike certain defenses and for the entry of a decree *pro confesso* against the petitioners (R. 22–23); the judgment of the District Court, granting the motion (R. 23–24); and the judgment of the court below affirming the judgment of the District Court (R. 27–28).

The facts may be summarized as follows:

On August 18, 1914, the then Secretary of War, under whose supervision and direction the Canal Zone territory had been placed, opened two deposit accounts in the District National Bank of Washington, D. C., a national banking association (R. 1–3). One of those accounts was designated "Secretary of War, Canal Zone Funds, Call Account"; the other "Secretary of War, Canal Zone Funds, Checking Account" (R. 23).

These accounts were opened pursuant to a contract entered into between the Secretary of War and the bank (R. 2–3; 8–11). This contract described the Secretary of War as the executive officer of the United States charged with the supervision and control over the governmental affairs of the Canal Zone, and provided as follows (R. 8):

(a) That as security for the safekeeping and prompt payment of the funds and the faithful performance of the contract, the bank would deposit

with the General Purchasing Officer of the Panama Canal bonds "of the acceptable value of a sum not less at any times than the amount of moneys and funds deposited under this agreement," the said bonds to be placed in the vaults of the American Security and Trust Company (R. 10);

(b) That in the event of the bank's failure to pay promptly or keep safely the funds deposited with it, the bonds would become the property of the Secretary of War, who might either retain or sell them, and apply the proceeds to the liquidation of any amount due from the bank, returning any residue to the bank (R. 10);

(c) That the contract would continue until terminated on written notice; or, in the event that Congress should "direct its termination or give instructions concerning the funds covered by this agreement inconsistent with the terms hereof," the bank was to pay over immediately any balance remaining to the credit of the accounts.[3]

The negotiation of the contract was specifically recommended by the Comptroller of the Currency and the Secretary of the Treasury, and the action of the Secretary of War in entering into the contract and in requiring the deposit of collateral security was approved by the Secretary of the Treasury (R. 15).

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[3] Other portions of the contract dealt with the classification of the accounts, payment of interest, and other details of administration of the accounts (R. 9–11).

On March 5, 1933, the bank was closed by Proclamation of the President of the United States; it never reopened, having been found and determined to be insolvent by the Comptroller of the Currency, who appointed a conservator on March 14, 1933. On November 6, 1933, a receiver, predecessor of the respondent, was appointed (R. 2, 13). At the time of the closing of the bank the credit balance in the "Call Account" amounted to $200,000 and the credit balance in the "Checking Account" amounted to the sum of $14,739.80 (R. 2, 3, 13). These sums were composed almost entirely of moneys received by the Postal Service of the Canal Zone, and consisted of deposit money-order funds and money-order funds (R. 14). The par value of the collateral deposited to secure the deposits was at that time $274,200 (R. 11).

On September 24, 1933, the securities were sold to the Hamilton National Bank, under an agreement and arrangement by the Secretary of War and the General Purchasing Officer with the then conservator of the bank (R. 3, 13). The Comptroller of the Currency was aware of the proposed sale and sanctioned and approved it (R. 15–16). From the proceeds of the sale the Secretary of War was paid $214,739.80, constituting the combined balance of the two accounts, together with $3,535.37, representing accrued interest to the date of the sale; this was accomplished by opening a new deposit account in the Hamilton National Bank in the name

of the Secretary of War, Canal Zone Funds (R. 3).

On June 4, 1936, the receiver of the District National Bank brought suit against the petitioners herein to recover that part of the proceeds which represented an amount in excess of the distributive dividends paid to general creditors.[4] In the complaint, in addition to the general facts contained in the foregoing statement, the receiver asserted, in substance, that the various defendants were being sued both in their official and individual capacities; that the pledge of securities by the bank and the acceptance and sale thereof by the Secretary of War were without authority of law; and that the proceeds of the sale became a trust fund for the benefit of the depositors, creditors, and stockholders of the bank (R. 1–3). The prayers for relief sought to compel the petitioners "as Secretary of War and General Purchasing Officer and Chief of Washington Office, The Panama Canal, respectively," to account for the funds (R. 6).

The petitioners in their answer averred that they were parties in their official capacities only, by substitution for their predecessors in office, and that the United States was an indispensable party defendant (R. 16). Reviewing the statutes and regulations relating to the Canal Zone (discussed in the

[4] The complaint also sought the recovery of the proceeds of the sale of collateral securities for the deposit of funds of the Government of the Philippine Islands by the Secretary of War (R. 4–7). The judgment below did not deal with this phase of the case, and it is not now before this Court.

Argument, *infra*), petitioners asserted that the making of the contract for the deposit and delivery of securities was within the lawful authority of the Secretary of War (R. 13). Petitioners further alleged that the action of the Secretary of War in taking security to safeguard deposits was specifically approved by the Secretary of the Treasury, that it was in accordance with a practice and custom of twenty years' standing, approved and sanctioned by the Secretary of the Treasury and by the Comptroller of the Currency, and acquiesced in by Congress, and that the sale of securities was approved by the Comptroller of the Currency (R. 15–16, 20).

The respondent's motion to strike certain parts of the answer and for the entry of a decree *pro confesso* was granted, and judgment was entered against the petitioners (R. 22–24). On appeal, the Court of Appeals for the District of Columbia affirmed the judgment (R. 28).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that a national bank could not lawfully pledge its assets to secure a deposit account which was made up of moneys received from deposit money order accounts and postal money order accounts of the Panama Canal.

2. In holding that the Secretary of War had no authority to require the deposit of assets as such security.

3. In failing to hold that the laws applicable to postal money order accounts in the United States were also applicable to the postal accounts of the Canal Zone.

4. In failing to hold that the moneys in question were public moneys of the United States.

5. In failing to hold that the United States is an indispensable party to this suit.

6. In affirming the judgment against the petitioners.

SUMMARY OF ARGUMENT

I

The District National Bank made a valid pledge when it transferred assets as security to safeguard the deposit made by petitioners' statutory predecessors as the executive officers charged with supervision of the affairs of the Canal Zone Government.

1. The validity of the pledge follows from the general governmental character of the deposit. This contention is elaborated in Brief for the Petitioners in *Inland Waterways Corp. et al.* v. *Hardee*, No. 6, this Term.

2. In any event the validity of the security is established by Congressional approval of the taking of the security. In 1910 the Secretary of War, charged with supervision over the governmental affairs of the Canal Zone, and faced with the problem of the safekeeping of the moneys of the Canal Zone, primarily money-order funds, entered into a

contract of deposit with the Commercial National Bank under which security was given to safeguard the deposit. In 1914 a similar agreement was concluded with the District National Bank. On April 1, 1914, upon the reorganization of the local government of the Canal Zone, the Governor of the Canal Zone promulgated regulations requiring that "Canal Zone money-order" funds and other funds be deposited by the Treasurer of the Canal Zone "in depositories under the contracts entered into by the Secretary of War." Governor's Circular No. 660–2. Pursuant to this regulation, retained substantially without amendment, moneys, consisting primarily of Canal Zone money-order funds and deposit money-order funds, were on deposit in the District Bank when it became insolvent in 1933.

The securing of the Canal Zone deposits was initiated upon the advice and with the assistance of the Secretary of the Treasury, and continued with the knowledge and approval of Comptrollers of the Currency. The officials governing the Canal Zone were following a plain governmental interest in obtaining a safe depository for its funds. And, obviously, this interest did not conflict with any policy of Congress which has not expressly prohibited pledges by a national bank, and has required security for other public funds.

3. The taking of security was early and frequently reported to Congress—in reports of the Isthmian Canal Commission, and later in reports

of the Governor of the Panama Canal; in a communication from the Secretary of War to the House of Representatives. Congress acquiesced in the practice and no disapproval was ever expressed. In these circumstances, the taking of security received the implied approval of Congress.

4. The validity of the taking of security is firmly established by the affirmative confirmation and approval of Congressional enactment. By the Act of August 21, 1916, Congress provided for the payment of interest on Canal Zone deposit money-orders, and further provided that such interest might be paid out of the "interest received from the Canal Zone money-order funds deposited in banks under Canal Zone regulations." The statute plainly referred to the regulations of the Governor, the only regulations under which money-order funds were deposited, and constitutes Congressional approval of the provision in the regulations requiring deposit under the contracts entered into by the Secretary of War, and accordingly of the taking of security. Thus, even if the acts of the officials in obtaining security were unauthorized when taken they were validated by this Congressional enactment.

Finally, the validity of the deposit, at least as to the deposit money-order funds, is independently shown by reference to the Act of February 16, 1933, which prescribes that the postal service of the Canal Zone shall be governed by such of the laws

and rules of the United States postal service as are not inapplicable to Canal Zone conditions. In view of the 1910 statute authorizing the taking of security for deposits of postal savings funds, the 1933 Act validated the security given to safeguard the deposit money funds, the Canal Zone counterpart of postal savings and recognized by Congress as issued in lieu thereof (Section 6 of the Act of August 21, 1916).

II

A. The suit must be dismissed as one brought against the United States without its consent, the Canal Zone being in effect merely one aspect of the Government of the United States.

B. Though the suit was nominally brought against the officers of the United States, the United States is nevertheless the only party against which in fact the relief was asked and against which the judgment or decree effectively operates.

1. This suit, alleging the invalidity of the pledge of bonds made in 1914 to secure the "Secretary of War, Canal Zone Funds" deposit, is an attempt to impress a constructive trust upon the proceeds of the bonds, a "Secretary of War, Canal Zone Funds" deposit in another bank.

2. The Canal Zone, the pledgee of the bonds, is an indispensable party defendant in this suit to recover the assets pledged or the proceeds thereof. The suit will effectively adjudicate the interests of

the United States, reducing its resources if successful. Petitioners have no personal interest in the case, and the United States is the only real party in interest in respondent's pursuit of property held for the United States for use for governmental purposes.

The doctrine of sovereign immunity is not inapplicable because respondent alleged that the pledge was invalid, and that therefore the property belongs to the Bank. This Court has rejected the conclusion that plaintiff by phrasing his complaint so as to deny title in the United States may preclude the United States from invoking its sovereign immunity. The very question whether the pledge was valid, and whether the proceeds would be returned to the Bank, is one on which the United States is "entitled to be heard," and which must be heard by Congress or such tribunal as it may designate.

Cases such as *United States* v. *Lee*, 106 U. S. 196, entertaining an action of ejectment against officers of the United States as individuals are distinguishable. Such a judgment would not be binding upon the United States; indeed, this inconclusiveness is inherent in the purely possessory common-law action of ejectment. Where the action is appropriate for the effective adjudication of property interests, and the complaint rests upon an underlying claim of right which is opposed by the United States as the real party in interest, the action will

be dismissed in the absence of the United States. Accordingly, this Court is without jurisdiction to consider respondent's assertion of a right to the proceeds of the bonds.

In any event respondent must concede that the United States has some interest in the proceeds of the bonds. Even if the pledge was *ultra vires* the bank, the transaction was voluntary and hence, as was intended by the parties, an interest passed to the pledgee. If the pledge was *ultra vires* the interest passed subject to an implied promise to return the property, but the suit to set aside the *ultra vires* transaction does so by terminating the interest illegally transferred. Indeed, this suit is one to impress a constructive trust and constitutes recognition that there is a legal interest outstanding which plaintiff seeks to have impounded for his benefit. Respondent in essence prays that a trust be impressed upon the "Secretary of War, Canal Zone Funds" account, in which the Canal Zone indisputably has a legal interest.

The foregoing discussion has proceeded upon the assumption that the Canal Zone funds deposited in the bank now being liquidated by respondent constituted money or property of the United States. This proposition was asserted by petitioners in their answer, and seems clearly correct. The money-order funds collected by the Canal Zone, which is merely one aspect of the United States, gave rise to a debtor-creditor relationship, the

moneys received becoming funds of the Canal Zone. Congress, moreover, has plenary control over the funds.

3. Apart from its pecuniary interest, the United States is an indispensable party defendant because its governmental interests have obligated it to make payment to the holders of the money orders and deposit money orders. A decree for respondent would effectively deprive the United States of the means of discharging this obligation, an obligation which would have been legally enforceable against a nonsovereign.

C. The want of jurisdiction of the present suit is equally clear from the consideration that the suit is maintained against petitioners not in their individual capacity but in their official capacity.

1. The decisions of this Court plainly hold that in the absence of Congressional consent a suit may be maintained against government officers only in their individual capacity, and not in their official capacity.

2. The basis and object of the present suit show that it is maintained against petitioners in their official capacity.

The suit in substance prays that the Court compel petitioners to withdraw funds from the "Secretary of War, Canal Zone Funds" bank account, a judicial mandate controlling their exercise of their powers as officials of the Canal Zone. Moreover, the mandate would require such exercise of

power in a manner not prescribed or authorized by statute, Congress having already appropriated the money-order funds to different purposes.

This Court has entertained actions, in ejectment, detinue, or replevin, based upon the possession of the defendant officers. Though defendant may be in possession as an officer of the United States, inevitably he also has *personal possession* of the property and he can be called upon, as an individual, to account for this personal, physical possession. A suit to impress a constructive trust, however, is based upon unjust enrichment. Plainly petitioners have *not* received *personal enrichment* by the possession of the proceeds of the bonds. The proceeds, whether Canal Zone bank account or other bonds, will either be used in the course of official duties or transferred to the successors in office. This action, asserting an equitable claim against an officer in possession of property, is brought against him in his official capacity. See *Governor of Georgia* v. *Madrazo,* 1 Pet. 110.

Moreover, even actions based upon the officer's possession must admit of an allegation that the possession is personal, and not official. This Court has countenanced actions to recover securities while yet in the possession of the seizing officer, or unlawfully taken by him, on the ground that such actions are defensive in character. The action is equivalent to a suit to enjoin the taking, the court stepping in before the taker has turned the prop-

erty over to his government and while it is possible to think of him as an individual trespasser. However, when the property has been turned over to another official, or a successor, it is undeniable that the latter's possession occurs only by virtue of his official capacity. In the present case, both petitioners are the successors in office of those who were in office when the bank conservator yielded the bank's assets; their possession of the proceeds of the bonds is purely an official possession.

3. The cases justifying the maintenance of suits brought against defendant officials in their individual capacity have been primarily concerned with unconstitutional legislation. In such cases the State or United States is deemed not involved because of a view that it may not be admitted that the State or the United States may violate the Constitution. In other cases, the Court has proceeded against officials acting in excess of their authority, and unlawfully assuming to exercise the power of government. These cases have permitted this Court to protect the citizens against arbitrary and unilateral action in the name of the Government.

In the present case, however, there is no unconstitutional legislation, no excess of authority so far as petitioners are concerned, no malice or conspiracy, no unilateral violation of plaintiff's rights. The bank engaged in a voluntary commercial transaction with an executive official, as to a matter the illegality of which was never conceived, and which

even now is at least doubtful. There exist none of the coercive elements which, under our theory of government, suggest that the suit is one against the officer as an individual. The bank has been dealing with certain persons as officials of the United States, and the receiver is now attempting to litigate a doubtful question arising out of that voluntary and long-continued commercial transaction. The real interest of the United States in this suit should be recognized by this Court.

ARGUMENT

Petitioners advance two grounds for reversing the judgment below: that the United States is an indispensable party defendant; and that the contract securing the Canal Zone deposits was valid. The former contention is jurisdictional, but will be presented last because appreciation of the argument is facilitated, to some extent, by acquaintance with the character of the Canal Zone deposit, an essential ingredient of the argument as to the validity of the security.[5] Again for the sake of clarity,

[5] While the pleadings are not as specific as might be desired, stating merely that the deposits were "almost entirely composed of" money order funds, the fact is that the small proportion of the deposits which represent other funds are equally covered by the argument made in Point I of this brief (except for the second congressional ratification developed at pp. 42–45, *infra*). However, if decisions for the Government were placed on Point I, directions for a new trial would seem necessary; if placed on Point II, a direction of dismissal would be appropriate.

in so far as the legality of the pledge is bottomed upon relatively general considerations with respect to federal deposits, the contentions will be developed in the petitioners' brief in No. 6. This brief will present the arguments peculiar to the Canal Zone.

I

The Pledge Is Valid

A. THE POWER OF RESPONDENT BANKS TO SECURE THE DEPOSITS IS ESTABLISHED BY CANAL ZONE REGULATIONS AND PRACTICES APPROVED AND RATIFIED BY CONGRESS

Authority for a national bank to give security for a deposit will be implied from any provision of law requiring or authorizing a government officer or agency to obtain security for the deposit. *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, 257, 258, and notes 11 and 12. Such provision may be found not only in federal legislation specifically providing for the security but also in Congressional approval and ratification of territorial legislation or regulations. *Berger* v. *Chase National Bank* (C. C. A. 2d), decided July 24, 1939. Canal Zone practices and regulations, and Congressional approval thereof, demonstrate the validity of the pledges given to secure the deposits involved in this case, which are composed almost entirely of moneys received by the postal service of the Canal Zone from the sale of money orders and deposit money orders (R. 14; No. 6, R. 84).

1. *The Orders, Regulations, and Practices Pursuant to Which the Canal Zone Funds Were Deposited and Security Was Taken*

(*a*) *Government of the Canal Zone*

For the sake of clarity and orderly discussion, we shall first review the statutes delegating the powers of government over the Canal Zone. The development of the government of the Canal Zone was surveyed by this Court in *McConaughey* v. *Morrow*, 263 U. S. 39. The Spooner Act of June 28, 1902, c. 1302, 32 Stat. 481, directed the President to build the canal, and created an Isthmian Canal Commission through whom the President was to do the work. The Act of April 28, 1904, c. 1758, 33 Stat. 429, authorized the President to take possession of the ten-mile "Canal Zone" with respect to which the rights of sovereignty had been granted by the Republic of Panama in the treaty of November 18, 1903 (33 Stat. 2234). Section 2 of this Act, Appendix, p. 5, provided that all military, civil, and judicial powers and the power to make all rules and regulations necessary for the government of the Canal Zone should be vested in such persons as the President should direct.

President Roosevelt, by letter of May 9, 1904, to Secretary of War Taft,[6] Appendix, pp. 43–46, au-

[6] The entire letter is set forth at pp. 20–26 of the volume "Executive Orders Relating to The Panama Canal (March 8, 1904, to December 31, 1921)," Annotated, 1921 (Panama Canal Press, 1922).

thorized the Isthmian Canal Commission to make all regulations for the government of the Zone and to legislate on all rightful subjects of legislation, and directed that this governmental power should be "exercised under your supervision and direction as the Secretary of War." A government was organized, a Governor of the Canal was appointed, and complete rules and regulations having the force of law were duly adopted. The Act of April 28, 1904, was expressly limited in duration to the expiration of the Fifty-eighth Congress, which occurred on March 4, 1905. However, the continued existence of the Government of the Canal Zone was recognized in appropriation acts. See *McConaughey* v. *Morrow, supra.* The Attorney General, in an opinion dated January 30, 1907, advised the Secretary of War that the 1904 law was merely declaratory of the President's duty under the treaty and the Spooner Act, to discharge the obligation of the United States to provide an orderly government for the Territory under its control; he concluded that the President may now, directly or through appointees and employees, "adopt needed rules and regulations for the government of the Canal Zone." 26 Ops. A. G. 113, 119. To resolve further doubts, Section 2 of the Panama Canal Act of August 24, 1912, c. 390, 37 Stat. 560, Appendix, p. 6, ratified and confirmed all laws, orders, regulations, and ordinances adopted in the Canal Zone by order of the President for the government of the Canal Zone.

Section 4 of this 1912 Act authorized the President to discontinue the Isthmian Canal Commission and thereafter to complete and operate the Panama Canal and govern the Canal Zone through a governor of the Panama Canal (48 U. S. C., sec. 1305). Section 7 provided that the Governor of the Panama Canal should perform all duties in connection with the civil government of the Canal Zone and that unless otherwise provided in the act "all existing laws of the Canal Zone referring to the civil governor or the civil administration" thereof should be "applicable to the Governor of the Panama Canal, who shall perform all such executive and administrative duties required by existing law" (48 U. S. C., sec. 1307). By Executive Order of January 27, 1914, effective April 1, 1914,[7] the President abolished the Isthmian Canal Commission and established a permanent departmental organization under the direction of the Governor, subject to the supervision of the Secretary of War.

(b) Canal Zone postal service

The Canal Zone postal service was established pursuant to an order of the Secretary of War dated June 24, 1904,[8] which provided for specified money-order offices. Act No. 8 of the Isthmian Canal Commission, dated September 2, 1904, Ap-

[7] See Appendix, p. 22. The entire order is set forth in opus cited *supra*, note 1, p. 155.

[8] See opus cited *supra*, note 1, p. 26.

pendix, p. 16, provided, *inter alia,* for the postal service and prescribed that it should be conducted according to the laws and regulations governing the postal service of the United States, so far as applicable.[9] A money-order system was established and approved by a resolution of the Commission of May 2, 1906 (see Appendix, pp. 19–20).

After the creation in 1910 of the United States postal savings system, the President, by Executive Order of September 8, 1911, established a postal savings system for the Canal Zone.[10] Because of inapplicability to local conditions, this order was repealed by Executive Order of September 5, 1914, which, instead, instituted what are now known as deposit money orders, by providing that—

> for the accommodation of persons desiring to deposit their savings in the post offices of the Canal Zone, money orders may be issued in the Canal Zone payable to the purchaser at the office of issue, for which no fee shall be charged.[11]

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[9] The complete Act is set forth at pp. 61, 75–76 of Laws of the Canal Zone, Isthmus of Panama, enacted by the Isthmian Canal Commission, August 16, 1904, to March 31, 1914 (Panama Canal Press, 1922).

[10] This is set forth in the Appendix, p. 20–21. This order created a board of trustees to supervise the postal savings depository offices and provided that the postal savings funds received should be deposited with the Treasurer of the Canal Zone. The system was operated without payment of interest.

[11] These deposit money orders were used not to transmit moneys but for purposes of saving, and after a period they drew interest, see Appendix, p. 8. Difficulty had been found

(c) *Canal Zone financial practices*

The Congressional appropriation Acts, from 1908 to 1914, appropriated the revenues derived from the Canal Zone postal service to the maintenance of that service, and appropriated the other funds collected by the Canal Zone Government substantially to the general Canal Zone governmental needs.[12]

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in the administration of the postal savings system whereunder postal savings deposits were evidenced by certificates issued in certain denominations, "each bearing the name of the depositor, the number of his account, the date of issue, and the name of the depository office" (Sec. 5 of Executive Order of September 8, 1911, Appendix, p. 21). The thrifty subsequently arranged their affairs, as they had previously, by buying deposit money orders to be cashed, if they so desired, at a later date.

[12] See Section 3 of the Sundry Civil Appropriation Act of May 27, 1908, c. 200, 35 Stat. 386, Appendix, pp. 5–6. A similar provision was contained in the subsequent Acts to and including the 1914 Act: e. g., Act of March 4, 1909, c. 299, 35 Stat. 945, 1026; Act of August 1, 1914, c. 223, 38 Stat. 674.

The Order of the Secretary of War, promulgated November 5, 1905 (Appendix, p. 17), had provided that money-order funds be deposited with the Treasurer of the Zone as postal receipts, but to the credit of the Director of Posts as money-order funds.

The legislative history of Section 3 of the Act of May 27, 1908, is as follows: The President's letter of May 9, 1904, Appendix, pp. 43–46, authorized the Isthmian Canal Commission, to subject to the Secretary of War, to exercise general legislative power, including the power to raise and appropriate revenue, and directed that governmental expenses be defrayed from local revenue so far as sufficient. The Comptroller of the Treasury held that these local revenues did not have to be covered into the Treasury, on the ground that the

By regulations effective October 1, 1908, issued by the Commission September 17, 1908, and approved by the Secretary of War October 31, 1908, there was established as a separate institution the Treasury of the Canal Zone, and local revenues were thereafter paid into this Treasury.[13] The appointment of a Treasurer raised the question of safekeeping of the moneys of the Canal Zone, which consisted primarily of money-order funds. The suggestion that some $700,000, which would remain in the nature of a permanent fund as cash in the Treasury of the Canal Zone, be deposited in a bank,[14] approved by the Chairman of the Commission[15] and supplemented by a specific recommendation of the Commercial National Bank of Washington, D. C., as the depository for Canal

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Canal Zone was not a territory "incorporated" into the United States, and was not covered by general Federal statutes but by such rules as the President might authorize. 11 C. D. 36. At hearings held on February 9, 1907, the House Committee on Appropriations expressed doubt as to the authority of the Isthmian Canal Commission to appropriate the local revenues and not cover them into the Treasury. House Hearings on Sundry Civil Appropriation Bill for 1908, pp. 892–894. Congress clarified the situation by expressly enacting what in substance had been the administrative practice.

[13] See "Canal Record" of October 14, 1908, p. 51.

[14] See Letter, Mr. Warwick to Lt. Col. Goethals, September 19, 1908, Appendix, pp. 46–51.

[15] See Letter, October 21, 1908, Chairman Goethals to Secretary Wright, Appendix, pp. 51–53.

Zone funds, was approved by Secretary Wright.[16] As petitioners alleged (R. 15; No. 6, R. 85), this action was the subject of correspondence with the Treasury Department. The Treasury Department stated what would constitute satisfactory security, and appropriate terms for the contract of deposit. The Secretary of the Treasury specifically advised the Secretary of War that a deposit in the Commercial National Bank would be safe and satisfactory if secured by certain bonds.[17] Thereafter, on May 11, 1910, the Secretary of War entered into a contract with the Commercial National Bank for the deposit of Canal Zone funds (R. 17–21, No. 6). On August 18, 1914, again in accordance with the advice of the Secretary of the Treasury,[18] the Secretary of War entered into a contract with the District National Bank (R. 8–11).

Both contracts of deposit state that the agreement is between the Bank and "the Secretary of War, the executive officer of the United States charged by the President with supervision and con-

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[16] See Letter, October 24, 1908, Chairman Goethals to Secretary Wright, Appendix, pp. 52–53, endorsed as approved by the Secretary.

[17] Letter, Secretary of Treasury MacVeagh to Secretary of War Dickinson, April 25, 1910, reprinted, Appendix, p. 57; Letter, Acting Secretary of Treasury Hilles to Capt. Boggs, April 21, 1910, reprinted, Appendix, pp. 55–56.

[18] Letter, Secretary of Treasury McAdoo to Secretary of War Garrison, July 28, 1914, reprinted, Appendix, pp. 57–58.

trol over the governmental affairs of the Canal Zone." Both contracts recite that the Secretary of War desires to secure a safe place for the deposit, custody, and disbursement of various administrative funds, deposits, postal funds, etc.; and also an expeditious method of examining and transferring the moneys (R. 8, No. 5; R. 18, No. 6). Both contracts provide for the deposit of bonds, which were of the same classes as those required by the Secretary of the Treasury, as "security for the safekeeping and prompt payment of the moneys and funds deposited under this agreement" (R. 10, No. 5; R. 19, No. 6).

These contracts of deposit, with their provisions for security, continued to be a datum in the Canal Zone's fiscal arrangements after the reorganization of the Canal Zone government. The President's Executive Order of January 27, 1914, effective April 1, 1914 [promulgated pursuant to Section 7 of the 1912 Act (see discussion, *supra,* pp. 20–21)], provided, *inter alia,* that the new government should consist of certain departments, including an Accounting Department under the direction of the Governor of the Panama Canal, subject to the supervision of the Secretary of War; and that the duties of the officers of this Department should be prescribed in regulations issued by the Governor, with the approval of the President.

The Governor, continuing the existing arrangement, as was obviously contemplated by Section 7

of the 1912 Act (*supra,* p. 21), issued regulations prescribing the deposit of the Canal Zone postal funds under the contracts entered into by the Secretary of War. Governor's Circular No. 660–2 of April 1, 1914, reprinted Appendix, pp. 25–27.[19] His regulations provided in part that the Collector should perform the duties theretofore performed by the Treasurer of the Canal Zone, and continued:

> For the funds of The Panama Canal, he shall take the Paymaster's receipts; *for Canal Zone, money order,* postal savings bank, clubhouse, and other trust *funds* and security deposits, *he* shall take the draft of the Paymaster on the Treasurer of the United States and *shall deposit same in depositories under the contracts entered into by the Secretary of War.* * * * [Italics added.]

Respondent suggests that this regulation applies to "money order" funds, but not to the "deposit money order" funds which replaced the postal sav-

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[19] 660 Series of Governor's Circulars relates to organization. See p. 157, n. 395 of Executive Orders relating to the Panama Canal, opus cited, *supra,* note 1. The Governor promulgates his regulations by circular.

It does not affirmatively appear that this regulation was approved by the President. Such approval may legitimately be inferred from the promulgation of the set of regulations upon the first day of the Governor's authority under the Executive Order of January 27, 1914. In any event the regulations were validated by Congress in the Act of August 21, 1916, see *infra,* note 25.

ings system. The "deposit money orders" are clearly covered by the regulation, since they are literally "money orders," being "money orders * * * issued in the Canal Zone payable to the purchaser at the office of issue" (Executive Order of September 5, 1914, Appendix, p. 24).[20] The regulation has always been applied to deposit money order funds, an interpretation approved in any event by the retention of substantially the same language in Governor's Circular No. 660–61 of April 5, 1923.[21]

2. Approval by Long Continued Practice and Congressional Acquiescence

We submit that the practice, contracts, and regulations just outlined, now of long standing, constitute a usage which has received Congressional approval and ratification.

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[20] Even under the original money-order system, prior to any institution of postal savings, many employees in the Isthmus purchased money orders payable to themselves at the place of issue and held them for many months. Letter of W. W. Warwick, to Lt. Col. Goethals, dated September 19, 1908, Appendix, p. 46–51.

See also Annual Report of the Governor of the Panama Canal for 1917, reciting statistics on "money orders" and including deposit money orders (p. 258).

[21] "Postal savings, money order, clubhouse, and other trust and security funds received shall be remitted to depositories in accordance with contracts entered into by the Secretary of War, and disbursed only on vouchers or warrants approved by the Auditor."

The taking of the security was indisputably appropriate to the proper conduct of the Canal Zone's finances. Under the 1904 Act, under principles of international law and under the 1912 Act, the President and his nominees had been granted powers of government over the Canal Zone in the broadest terms. The plain governmental power to raise, hold, and disburse revenues carried with it an equally plain governmental interest in the securing of the revenues and funds of the Canal Zone. As the Circuit Court of Appeals for the Second Circuit, in *Berger* v. *Chase National Bank, supra,* said, of the exaction by the Philippine Government of security for its deposits (in respondent banks among others):

> Now there can be little doubt that selection of a safe depositary for its funds is a necessary power to a government. That the power of designation should be extended to banks outside the Islands was natural and fitting, in view of the close relations between the Islands and the mainland and the large business transactions requiring the difficult and expensive task of continual intertransfer of funds between them unless national depositaries were chosen. Indeed, the beneficial nature of the arrangement to all concerned—the banks, the Philippine Government, and the Bureau of Insular Affairs in adjusting and making smooth the course of a civil government in the Islands—was undoubtedly a reason not only for the original

grant, but for the fact that it was not questioned until the present suits.

Moreover, as stated in the *Berger* case, there is no conflict between this governmental interest and any legislative policy of Congress. Congress has always been astute not to place national banks upon a competitive disadvantage with state banks, and it did not specifically prohibit pledges in a national bank. *McNair* v. *Knott,* 302 U. S. 369, 371. Indeed, Congress has even required security to protect the deposits of other public funds. *Texas & Pacific Ry. Co.* v. *Pottorff, supra,* at 257. In reference to Congressional policy, it is particularly significant that the present case involves money-order funds,[22] and, primarily, deposit money-order funds, the lineal descendant of Canal Zone postal savings funds, and therefore referable to the statutes authorizing security for United States deposits of postal savings funds.[23]

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[22] Continental money order funds are governed by R. S. § 4045, 39 U. S. C. § 736, which provides that all money received for the sale of money orders, money transferred from the postal revenues to the money order funds, etc., shall be deemed money order funds and money in the Treasury of the United States, and that it shall be the duty of the Treasurer, etc., to open, at the request of the Postmaster General, an account of "money-order funds" deposited by postmasters to the credit of the Postmaster General and of drafts drawn by him and countersigned by a post office comptroller. See also R. S. § 4042, 39 U. S. C. § 733; R. S. § 4043, 39 U. S. C. § 734.

[23] Act of June 25, 1910, 36 Stat. 814, as amended (39 U. S. C. secs. 759, 766). See discussion, *infra,* pp. 40–43.

The requirement of security for the Canal Zone deposits was initiated with the assistance of the Secretary of the Treasury (see *supra,* p. 23) and was continued for more than twenty years with the knowledge and approval of the Comptrollers of the Currency and of the Secretaries of the Treasury (R. 15). Congress was given specific notice of this security. It was informed by the Annual Report of the Governor of the Panama Canal for 1915 (pp. 278, 279):

> The depositaries of Canal Zone funds, including in that term money order, postal savings, and clubhouse funds, have been continued three in number, the District National Bank and the Commercial National Bank, of Washington, D. C., and the Panama Branch of the International Banking Corporation. On June 30, 1913, the amount on deposit was $2,168,339.62; on June 30, 1914, $1,594,285.53; and on June 30, 1915, $770,-965.18. There is also a small amount still remaining in the Riggs National Bank of Washington, necessarily left there on account of outstanding checks chargeable against the deposit. These funds are all secured by the deposit of high-grade bonds under the control of a representative of the Government. Interest on deposits during the year amounted to $48,798.35, as against $61,354.12 received during 1914.[24]

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[24] This language appears in the Auditor's report to the Governor, which was printed as an appendix to the annual

Several other reports and advices informed Congress of the existence of this security. See Annual Report of the Isthmian Canal Commission for 1913, p. 415, Appendix, pp. 35–36; Annual Report of the Isthmian Canal Commission and The Panama Canal for 1914, p. 328, Appendix, p. 36; Annual Report of the Governor of the Panama Canal for 1916, Appendix, p. 37; Letter, Secretary of War Baker to Speaker of House of Representatives, dated September 12, 1919, set forth in H. Rep. No. 1083, 67th Cong., 2d Sess., p. 16, Appendix, pp. 38–42.

These facts suffice to establish the validity of the taking of security. The practice was long-continued, in existence for over twenty years. It was in furtherance of the governmental interests of the Canal Zone, and did not fly in the teeth of any Congressional prohibition or prohibitory policy. It was countenanced and supported by the Treasury Department. It was early and insistently reported to Congress. The Congress acquiesced in the practice; at no time was any disapproval expressed.

In these circumstances, it seems plain that the taking of security received the implied approval of Congress. The case is one for the application of *United States* v. *Midwest Oil Co.*, 236

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report of the Governor to the Secretary of War and referred to and incorporated therein. This report was submitted in the usual manner by the President to the Congress for its information and was printed as House Document No. 23, 64th Cong., 1st Sess.

U. S. 459. In that case the Court upheld the power of the President to withdraw public lands reported to contain valuable petroleum deposits, although there was no statutory authority for it. The Court said (pp. 469, 472, 473):

> We need not consider whether, as an original question, the President could have withdrawn from private acquisition what Congress had made free and open to occupation and purchase. The case can be determined on other grounds and in the light of the legal consequences flowing from a long continued practice to make orders like the one here involved. For the President's proclamation of September 27, 1909, is by no means the first instance in which the Executive, by a special order, has withdrawn land which Congress, by general statute, had thrown open to acquisition by citizens. And while it is not known when the first of these orders was made, it is certain that "the practice dates from an early period in the history of the government."
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> It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular prac-

> tice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.

Compare *United States* v. *Macdaniel,* 7 Pet. 1, 14, 15.

3. Ratification by Congress

In the present case, however, the question is even clearer than in the *Midwest Oil* case, for the practice was not only acquiesced in by Congress but was affirmatively confirmed and approved by Congressional statute.

Sections 6 and 7 of the Act of August 21, 1916, c. 371, 39 Stat. 528, provide:

> SEC. 6. That deposit money orders issued in the Canal Zone in lieu of postal savings certificates in accordance with the rules and regulations heretofore established by the President, or that may hereafter be established by him, shall bear interest at a rate not exceeding two per centum per annum.
>
> SEC. 7. That the interest received from the *Canal Zone money-order funds deposited in banks under Canal Zone regulations* shall be available to pay the interest on deposit money orders authorized by the preceding section. Such interest shall also be available to pay any losses which are chargeable to

> the Canal Zone postal service. [Italics supplied.]

This statute constituted clear recognition and ratification of Governor's Circular No. 660–2, *supra,* p. 27. Approval of the regulations carries with it approval of the provisions of the regulations, and accordingly approval of the contracts entered into by the Secretary of War, including their security provisions. See *Mason Co.* v. *Tax Commission,* 302 U. S. 186, where ratification and validation of "all contracts" executed in connection with the Grand Coulee Dam (p. 196) was held to validate terms of the construction contracts contemplating the exercise of local jurisdiction by state officers (p. 208).

The court below adverted to the fact that the pledge was not authorized by any regulation promulgated by the President (R. 117, No. 6). It seems patent that the Act validates the regulations of the Governor. The Act clearly refers to funds already deposited, with interest—the deposits made known to it by the Reports cited above (pp. 31–32); and likewise the Act clearly refers to the funds deposited under regulations in existence. It states what use shall be made of "*the* interest received from *the* Canal Zone money-order *funds deposited* in banks *under Canal Zone regulations.*" The only regulation under which Canal Zone moneys were deposited in banks was the regulation of the Governor of April 1, 1914, and that regulation specifi-

cally commanded the collector to deposit these funds "under *the* contracts entered into by the Secretary of War." [Italics added throughout.]

That this was the purpose of Congress is clearly indicated by the Report of the Governor of the Panama Canal for 1916, p. 485, where reference is made to the deficit of the Canal Zone postal system—

> As previously stated in this report, a large part of the deficit of the Canal Zone postal system would be wiped out if the postal division were allowed interest received from Canal Zone money-order funds *deposited in banks under Canal Zone regulations.* In the past these earnings have been deposited with the United States Treasurer. If this interest were credited to the postal division, it would also permit the payment of interest upon deposit money orders. The following sections were therefore made a part of a bill which passed the House of Representatives on June 17, 1916 (H. R. 15955) * * *. [Italics added.]

The reference was to sections 7 and 8 of H. R. 15955, which were enacted as sections 6 and 7 of the above Act of August 21, 1916. This report makes it clear that the regulations referred to were the Governor's regulations under which the moneys were already deposited. It may be noted that, when the Senate considered the bill, it was substantially disposed of on the basis of the statement of the mem-

ber in charge that the bill represented legislation recommended by General Goethals and approved by the War Department (53 Cong. Rec. 11742).

The Canal Zone practices and regulations, as we have noted above, were in furtherance of the governmental interests. And even if invalid when promulgated, because Congress had not authorized the taking of security from national banks, they were ratified or validated by the 1916 Act.[25] A Congressional statute proceeding upon the basis of the validity of an existing practice or regulation will validate such practice even though Congress has not specifically purported to impart validity. See *Mattingly* v. *District of Columbia*, 97 U. S. 687, 690; *Tiaco* v. *Forbes*, 228 U. S. 549, 556. In the recent decision of *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, an Executive Order transferring the powers conferred upon the United States Shipping Board to the Secretary of Commerce was held confirmed and approved by Acts making appropriations to the Department of Commerce for expenses incurred in discharging those functions, and by a later statute transferring the functions from the Department of Commerce to another agency. This Court said (pp. 301–302):

> It is well settled that Congress may, by enactment not otherwise inappropriate,

[25] Similarly the regulation was given Congressional validation, even if originally it was defective because issued without the approval of the President (*supra*, note 19, p. 27).

> "ratify * * * acts which it might have authorized," see *Mattingly* v. *District of Columbia,* 97 U. S. 687, 690, and give the force of law to official action unauthorized when taken [citing cases]. And we think that Congress, irrespective of any doctrine of ratification, has, by the enactment of the statutes mentioned, in effect confirmed and approved the exercise by the Secretary of powers originally conferred on the Shipping Board.

In declaring a continuing policy of appropriation of the interest received from the deposits under regulations, Congress necessarily confirmed and approved the regulations under which the interest was earned. And since under the regulations the moneys were deposited under contracts with national banks calling for security, the giving of security was likewise approved. The taking of security had been reported to Congress (see *supra,* pp. 31–32), and, in a sense, was an integral, underlying part of the 1916 legislation.

Moreover, the House Committee Report reveals that when Congress raised the interest rate on deposit money orders to three percent in 1922 (Act of September 21, 1922, c. 370, 42 Stat. 1008), in order to encourage thrift among the employees of the Canal Zone, it did so on the basis of the letter of Secretary of War Baker to the Speaker of the House of Representatives, September 12, 1919,

quoted by the House Committee and reading in part as follows:

> It should be stated that the postal money-order funds of the Canal Zone are deposited in banks in the United States, upon which interest is paid, and which funds are secured by the deposit of certain standard bonds. The interest thus received will more than pay the proposed rate of 3 percent on deposit money orders, and therefore there will be no loss to the United States Government if the rate is increased as requested, * * *.[26]

In view of this 1916 legislation, supplemented by the 1922 legislation, the validity of the pledges securing the Canal Zone deposits is established by Congressional sanction.

The court below, in considering the effect of the 1916 statute, stated (R. 116, No. 6):

> And it would appear also to constitute recognition and approval of the depositing of money-order funds under regulations. But the difficulty is that, so far as we can discover or have been advised, there were no regulations in this respect in existence.

The court did not refer to Governor's Circular No. 660–2, promulgated in 1914.[27] This regulation

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[26] See H. Rept. No. 1083, 67th Cong., 2d Sess., p. 16.

[27] This is not contained in the answer, but was handed up to the court at the argument and was therefore available for consideration. *Minnesota* v. *United States*, 305 U. S. 382, 390. The Circular is set forth in Volume 7, Canal Record, May 13, 1914, page 365.

could not have been dismissed by the court below, as was the similar regulation promulgated in 1923 (Governor's Circular No. 660–61), on the ground that it was promulgated after the passage of the 1916 Act. We submit, on the contrary, that the 1916 and 1922 Acts constituted an approval of the taking of the security provided for in the 1914 regulation.

Finally, it may be noted that a wholly independent statute constitutes authority for the security safeguarding the Canal Zone deposits to the extent that they consist of deposit money order funds. The Act of February 16, 1933, c. 89, 47 Stat. 812 (48 U. S. C., Sec. 1323a), provides:

> SEC. 1. The postal service of the Canal Zone shall be governed by such of the laws, rules, and regulations of the Postal Service of the United States as are not inapplicable to the conditions existing in the Canal Zone, and the Governor of the Panama Canal is authorized to establish new post offices or discontinue those already established, to provide such rules and regulations as are necessary for the operation of the service, to appoint the personnel thereof, and to prescribe the postage stamps and other stamped paper which shall be used in such service: *Provided, however,* That the expenses of operating the Canal Zone postal service shall be defrayed, so far as possible, from the revenue derived therefrom, the use of which for that purpose is hereby authorized.

This Act embodied a long-continued policy of conformance to the continental practice.

On September 2, 1904, Act No. 8 of the Isthmian Canal Commission established a postal service to be conducted, regulated, and controlled by such of the laws, rules, and regulations of the Postal Service of the United States as were not inapplicable to Canal Zone conditions.

The United States postal savings system was established under a 1910 Act specifically requiring the board of trustees of the postal savings system to deposit postal savings funds in banks and to take security for the deposits, 39 U. S. C., Sec. 759. The President, by Executive Order of September 8, 1911 (Appendix, pp. 20–21), established a postal savings system, and provided for a board of trustees, consisting of local officers. This board was given power to make regulations for the receipt, deposit, investment, and repayment of the funds. The President thus made this new aspect of the United States postal service applicable to the Canal Zone, obviously intending it to apply so far as not inapplicable. The provision of the Federal statute for deposit by the continental board of trustees was inapplicable; but the provision for taking security was fully applicable to local conditions.

The Executive Order of September 5, 1914, repealed the system calling for postal savings certificates and set up deposit money orders, an equivalent *savings* system. The Act of August 21, 1916

(*supra,* pp. 34–35), authorized the payment of interest on "deposit money orders issued in the Canal Zone in lieu of postal savings certificates." Although these certificates were inapplicable to Canal Zone conditions (*supra,* note 7), the safeguarding of the local savings was certainly not inapplicable to local conditions. The security taken by the Treasurer, pursuant to the contracts of the Secretary of War incorporated into the Governor's regulations, for the deposit money order funds, was accordingly validated by the Act of February 1, 1933. The continental policy of protecting postal savings depositors by securing their funds was applicable to, and was carried over to, their thrifty counterparts in the Canal Zone.

It is no answer to this contention to point out that the deposit and pledge preceded the enactment of this measure. A statute containing authority to make a pledge will operate to validate security given prior to the statute on deposits made likewise prior to the Act. *McNair* v. *Knott,* 302 U. S. 369.

The court below suggested that the 1933 Act only sanctions regulations of the Governor. But the taking of security was in effect required by the regulations of the Governor of 1914 (*supra,* pp. 27, 28) and 1923 (*supra,* p. 28; R. 116, No. 6), through their reference to the contracts made by the Secretary of War (*supra,* pp. 25–28), promulgated both in 1914 and 1923. Moreover, we submit that though the Act authorized the Governor to promulgate

rules and regulations, its effect was not so confined, but extended approval to an existing institution insofar as it conformed to the continental postal service.

B. THE POWER EXISTS INDEPENDENTLY OF PROVISIONS OF LAW APPLICABLE SPECIFICALLY TO THE CANAL ZONE

As stated above (p. 18), the more general considerations indicating the power of national banks to secure deposits of federal agents keeping public moneys is presented in the brief of petitioners in *Inland Waterways Corp. et al.* v. *Hardee*, No. 6, this Term.

II

CONGRESS HAS NOT CONSENTED TO THE MAINTENANCE OF THIS SUIT, AND THEREFORE THE DISTRICT COURT WAS WITHOUT JURISDICTION

A. THE GOVERNMENT OF THE CANAL ZONE MAY CLAIM THE IMMUNITY OF THE UNITED STATES FROM SUIT

It has been repeatedly recognized, since the very beginning of this Government, that the United States without its consent cannot be sued in any court in this country, and that a controversy against the United States may be maintained only before Congress or such tribunal as it may designate. *Cohens* v. *Virginia*, 6 Wheat. 264, 411; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 384, 386; *Williams* v. *United States*, 289 U. S. 553, 573; *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306

U. S. 381. This immunity from judicial suit without consent stems from the sovereignty of the United States. *Williams* v. *United States, supra,* 573, 577. This Court has held it inherent in the nature of sovereignty not to be amenable to suit without consent, and has accordingly held the doctrine of immunity applicable to foreign states, and to the States of the Union, even in controversies not covered by the Eleventh Amendment.[28] *Hans* v. *Louisiana,* 134 U. S. 1; *Monaco* v. *Mississippi,* 292 U. S. 313, 321, 323; see *The Federalist,* No. 81; dissenting opinion of Justice Iredell in *Chisholm* v. *Georgia,* 2 Dall. 419, 429. The theoretical foundation of the immunity of the sovereign may be subject to academic dispute but the immunity itself is unquestioned. *Keifer & Keifer* v. *Reconstruction Finance Corporation, supra.*

We have seen the various steps by which Congress provided a civil government for the Canal Zone (*supra,* pp. 19–21). See *McConaughey* v. *Morrow,* 263 U. S. 39. The constitutionality of that undertaking cannot be disputed. Powers of sovereignty over the Zone were obtained by treaty with Panama. *Wilson* v. *Shaw,* 204 U. S. 24. Con-

[28] It has been said that, in determining whether a suit must be dismissed as one against, or affecting, the United States, exactly the same rules apply as obtain in determining whether a suit must be dismissed because of the sovereign immunity of a State. *Kansas* v. *United States,* 204 U. S. 331, 341; *Minnesota* v. *Hitchcock,* 185 U. S. 373, 387; *Hopkins* v. *Clemson College,* 221 U. S. 636, 645.

trol by Congress over the Canal Zone may thus be related to the treaty power, or, since historically the Zone was acquired as an adjunct of the Panama Canal, to the power to provide for the national defense, and to regulate commerce. *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401, 406.

The Panama Canal and the Canal Zone constitute in effect merely one aspect of the Government of the United States. This Court has referred to the Panama Canal as one of the "minor independent departments" of the Government. *Emergency Fleet Corp.* v. *Western Union*, 275 U. S. 415, 418. A suit against the Canal Zone must be dismissed as a suit against the United States, unless Congress has consented to its maintenance. *Compagnie Generale Transatlantique* v. *Governor of the Panama Canal*, 90 F. (2d) 225 (C. C. A. 5th), certiorari denied, 302 U. S. 720. No consent to the maintenance of this suit has been given.

In considering the application of the principle of sovereign immunity to this type of suit it is immaterial that the United States, or the Canal Zone, is not nominally a party of record. *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, 296.[29] Two

[29] It was once held that whether a suit was one against a State was to be determined by the party named as defendant. *Osborn* v. *United States Bank*, 9 Wheat. 738; *Davis* v. *Gray*, 16 Wall. 203. This rule has been discarded. *Poindexter* v. *Greenhow*, 114 U. S. 270, 275, 287; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 386.

types of reasoning and statement may be found in the cases. Thus this Court has said that the doctrine of sovereign immunity extends to suits "against its officers, agents, and representatives, where the State, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates." *In re Ayers,* 123 U. S. 443, 506; *Belknap* v. *Schild,* 161 U. S. 10, 25. The Court will refuse to take jurisdiction whenever it can be clearly seen that the State or the United States is an indispensable party defendant. *Cunningham* v. *Macon & Brunswick R. R. Co.,* 109 U. S. 446, 451. Again this Court has held that although certain suits may purport to be brought against United States officers in their individual or personal capacity, when it appears that the defendants have no individual or personal interest in the controversy, and that the suit seeks to control their actions and exercise of functions as officers of the United States, the immunity from suit is applicable. *Belknap* v. *Schild, supra; Oregon* v. *Hitchcock,* 202 U. S. 60, 68; *Worcester County Trust Co.* v. *Riley, supra; Hagood* v. *Southern,* 117 U. S. 52, 69; *Cunningham* v. *Macon & Brunswick R. R. Co.,* 109 U. S. at 457.

We propose to submit our contentions under these two different, though largely overlapping, headings. We shall first demonstrate that the United States is the real party against which the

respondent asked relief, and the one against which the judgment will effectively operate, because the judgment will affect the resources and interests of the United States. We shall then show that the suit is not maintained against petitioners in their personal capacity, but in their official capacity. Under either analysis, the United States is an indispensable party defendant.

B. THIS IS A SUIT FOR A DECREE OPERATING AGAINST THE UNITED STATES AND AFFECTING ITS RESOURCES AND INTERESTS

This suit is in truth directed at the property and interests of the United States. The sovereign is, therefore, an indispensable party defendant. Since it has not consented to this suit, it must be dismissed.

1. This is a suit to impress a constructive trust upon property held for the United States

We inquire first into the basis and object of this suit. The receiver of the District National Bank alleged that in 1914 the Secretary of War opened "Secretary of War, Canal Zone Funds" accounts and received a pledge of bonds to secure the deposit; that the pledge was unlawful and must have been received in trust for the Bank; and that when the bonds were sold after the Bank had closed and the proceeds paid by setting up a deposit account in the Hamilton National Bank, entitled "Secre-

tary of War, Canal Zone Funds," the proceeds were recoverable as a trust fund for the benefit of the creditors of the Bank (R. 2, 3, 6, 8). The bill prayed that the defendants, Mr. Dern, Secretary of War, and Mr. Flint, Chief of Washington Office of the Panama Canal, or their successors in office, account for certain sums (R. 6). Petitioners, substituted as successors of the original defendants, were ordered to pay over a certain amount of money (R. 23, 24).

In affirming this judgment, the Court of Appeals below (R. 28) referred to the allegations of the bill that the proceeds of the bonds were recoverable as a trust fund, and affirmed upon the basis of its opinion in *Inland Waterways Corp. et al.* v. *Hardee*, No. 6, this Term. That opinion considered first the case of the Merchant Fleet Corporation, held that the retention of the security after the bank's insolvency constituted a conversion of trust property, and held the Corporation liable in damages as a participant in a breach of trust though it had turned the proceeds over to the United States (R. 113, No. 6). However, as to the Canal Zone funds the court stated that "The pledged bonds or their proceeds are in the hands of the Secretary of War," and that "he must restore the bonds or refund the proceeds from their sale" (R. 119, No. 6).[30]

[30] The court's opinion is somewhat obscure. It referred to the liability of the Secretary of War as one who "participated in a conversion of the bank's assets" and must respond "just as any other person who had participated in a prefer-

The bill is essentially one to impress a constructive trust upon the proceeds of the bonds on the theory that upon the alleged conversion of the bonds equity would regard the proceeds as received by the participant in trust for the plaintiff, and enable the plaintiff to recover the proceeds. Apparently the court below, in approving the recovery, applied the principle that a constructive trust is an equitable remedy available in some cases of wrongdoing or inequitable conduct to prevent an unjust enrichment to the wrongdoer. *Chapman* v. *County of Douglas,* 107 U. S. 348, 355–358; *Angle* v. *Chicago, St. Paul, etc., Ry.,* 151 U. S. 1, 26; see Cardozo, J., in *Beatty* v. *Guggenheim Exploration Co.,* 225 N. Y. 380, 386, 122 N. E. 378; *American Law Institute,* Restatement, Restitution, § 160; *Bogert,* Trusts and Trustees, § 471; *Story,* Equity Jurisprudence (14th ed.), § 1663.

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ential transfer" (R. 119, No. 6). The confusion ensues from the failure to make considered reference to the effect of the substitution of Secretary Woodring into the present proceeding, which was begun against Secretary Dern. Plainly, petitioner Woodring, who did not become Secretary of War until 1936, did not "participate" in any preferential "transfer," which occurred, if at all, in 1933. He cannot be made personally liable in damages for the act of his predecessor in office. *Smietanka* v. *Indiana Steel Co.,* 257 U. S. 1. Secretary Woodring can be held responsible only to the extent that a personal action might have been commenced against him as the original defendant. *Ex parte La Prade,* 289 U. S. 444; *Allen* v. *Regents,* 304 U. S. 439, 444; *Union Trust Co.* v. *Wardell,* 258 U. S. 537, 542. See discussion, *infra,* pp. 74–86.

Whatever the applicability of this theory to governmental acts, and whatever its applicability in a case against a substituted officer, it seems plain, as we shall show, that the suit reaches assets of the United States and affects the governmental interests in the performance of the functions of the Canal Zone. From either view the United States is an indispensable party defendant.

2. The suit will operate to divest the United States of assets

(a) Viewing this case in its bare essentials, we find that by contract with the Canal Zone, through its executive officer, the Bank has given a pledge to the Canal Zone to secure its deposits; that the pledged assets have been sold and the proceeds turned over by the Bank to the Canal Zone and deposited in another bank for its own account. This established a credit on behalf of the United States, and constitutes property of the United States available to serve its governmental purposes. The respondent desires to attack the pledge and to reach the property which has been yielded to the former pledgee.[21] We submit that it cannot

[21] We do not conceive it to be material to the present argument that, as a matter of form, the District Court phrased its judgment in terms of an ordinary money judgment (R. 23–24). This form was worked out in order to make adjustment for certain credits admittedly owed to the United States in the event of a return of the securities delivered or the proceeds of the sale thereof. From the theory of the com-

take back the property from such pledgee without making it a party. The reduction of the funds available to the United States constitutes an obvious and direct injury to the United States, and demonstrates that, in the language of the cases, the United States is the real party in interest in the suit and the one against whom the judgment or decree effectively operates.

This common-sense conclusion is amply supported by the precedents. This Court has consistently refused to entertain suits which would operate to diminish the property interests of the United States. It was early recognized that "there is no distinction between suits against the government directly, and suits against its property," and that "direct suits cannot be maintained against the United States, or against their property," *The Siren,* 7 Wall. 152, 154; *Belknap* v. *Schild,* 161 U. S. 10; *Minnesota* v. *United States,* 305 U. S. 382, 386.[32]

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plaint and of the opinion of the Circuit Court of Appeals, it is plain that this judgment was imposed upon petitioners only because of their present control of the proceeds of the bonds, and that the judgment is enforceable only by virtue of that alleged control.

[32] In holding that a defendant's writ of error against a State is not a suit against the State, the Court pointed out that nothing was demanded from the State, and that "The party is not to be restored to the possession of anything." *Cohens* v. *Virginia,* 6 Wheat. 264, 410.

It need not be considered whether *The Davis,* 10 Wall. 15, can be extended to cases not sounding in salvage or admiralty, for in that case the Court relied upon the fact that the cargo was not in the custody of an official.

The doctrine emphatically requires the dismissal of actions to recover property claimed by the United States in which the interest of the United States will be effectively adjudicated. *Stanley* v. *Schwalby*, 162 U. S. 255; *Leather* v. *White*, 266 U. S. 592, affirming 296 Fed. 477 (C. C. A. 7th). An action will be dismissed if in effect it attempts to subject the property of the state to judicial process in order to satisfy a liability. *Christian* v. *Atlantic & N. C. R. Co.*, 133 U. S. 233; *Smith* v. *Reeves*, 178 U. S. 436; *Ex parte State of New York, No. 1*, 256 U. S. 490, 500–501.[33]

The Court will refuse to entertain actions qualifying or affecting the property interests of the state. *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446. The immunity doctrine applies as well to moneys of the sovereign as to other types of property. See *Louisiana* v. *Jumel*, 107 U. S. 711, 718. And moneys not reposing in the Treasury may still be moneys of the United States. *Buchanan* v. *Alexander*, 4 How. 20. The state's immunity has necessarily been extended to moneys kept by it in a bank account separate from the other moneys of the state. *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 171, 172; *Lankford* v. *Platte Iron Works*, 235 U. S. 461.

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[33] *The Exchange*, 7 Cranch 116, and *Berizzi Bros. Co.* v. *Pesaro*, 271 U. S. 562, mark the failure of avowed attempts to reach the property of a sovereign.

A leading case is *Belknap* v. *Schild*, 161 U. S. 10, where a suit to enjoin defendant officials from infringing plaintiff's patent, through the use of government property, was dismissed for want of jurisdiction. The Court explained (p. 25) that—

> the defendants had no individual interest in the controversy; the entire interest adverse to the plaintiff was the interest of the United States in property of which the United States had both the title and the possession; the United States were the only real party, against whom alone in fact the relief was asked, and against whom the decree would effectively operate; the plaintiff sought to control the defendants in their official capacity, and in the exercise of their official functions, as representatives and agents of the United States, and thereby to defeat the use by the United States of property owned and used by the United States for the common defense and general welfare; * * *

And in *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601, applying this doctrine to property leased by the United States, Mr. Justice Holmes added that the right of the United States to use this property cannot "be interfered with behind its back and, as it cannot be made a party, this suit, * * * must fail" (p. 606). See also *United States ex rel. Goldberg* v. *Daniels*, 231 U. S. 218; *Hopkins* v. *Clemson College*, 221 U. S. 636. With like force it may be said here that petitioners

have no personal interest in this case, that respondent is pursuing property held for the United States which it will use for governmental purposes, that the United States is the only real party in interest, and that its right to the property cannot be tried behind its back, but must be litigated before Congress or such tribunal as it may designate.

(b) Such, in simple form, is the teaching of the cases. Respondent seeks to avoid their force by urging that in them the property concededly belonged to the United States. Attention is called (Br. in Opp., p. 16) to the statement in the *Bruce* opinion, that *Belknap* v. *Schild* differed from *United States* v. *Lee,* 106 U. S. 196, and other cases, "in the fact, among others, that the title of the United States to the caisson gate was admitted" (194 U. S. 601, at 606).

The significance of the *Lee* case will be fully considered below (pp. 58, *et seq.;* 75, 81). It is sufficient here, to repel respondent's argument, to note that the *Lee* case does not authorize the present suit merely because the respondent in the present case claimed the property in question and did not recognize or "admit" any continuing rights in the United States. Many plaintiffs alleging ownership have found this Court aware that their suits nominally against officers of the United States in reality were actions to obtain consideration of their claims against the United States itself. In *Oregon* v. *Hitchcock,* 202 U. S. 60, the State of Oregon, claiming lands under the swamp-land Acts, filed a bill

against the Secretary of the Interior, praying that he be enjoined from allotting the lands to certain Indians, and praying a decree establishing the title of the states. The Court dismissed the suit, relying upon *Minnesota* v. *Hitchcock,* 185 U. S. 373, 387, and stating that, the suit being one to divest the United States of title, the United States was the real party in interest, the officers having no pecuniary interest in the land or its proceeds.

In accord are *Naganab* v. *Hitchcock,* 202 U. S. 473; *Louisiana* v. *Garfield,* 211 U. S. 70, n. 78; *New Mexico* v. *Lane,* 243 U. S. 52, 58; *Leather* v. *White,* 266 U. S. 592.

In the *Lee* case, this Court entertained ejectment actions against officials in possession of land claimed by the plaintiff. Respondent's position apparently comes to this, that in the *Lee* case the Court had jurisdiction because the United States did not own the property, and similarly in the present case ownership or title was never in the United States (Br. in Opp., pp. 16–17). The fallacy implicit in this reasoning is the obvious consideration that the very question whether the pledge is valid, and whether the proceeds should be returned to the bank, is a question on which the United States is "entitled to be heard," or, more accurately put, is a question which must be heard where Congress directs. *Louisiana* v. *Garfield,* 211 U. S. 70; *Morrison* v. *Work,* 266 U. S. 481. Otherwise, every time the plaintiff claimed title to property claimed by or administered by the United States, a court could

avoid the doctrine of sovereign immunity by referring to the complaint's assumption that the property belonged to plaintiff, and then trying the merits.

Indeed, the question has already been settled by this Court. In *Louisiana* v. *Garfield,* 211 U. S. 70, the state filed a bill against the Secretary of Interior and Commissioner of the General Land Office to establish title to certain lands claimed under the swampland Acts. In response to a demurrer, lodged on the ground that the suit was against the United States, the state argued (see 211 U. S. at 72–73):

> According to the theory of the present bill, the title to the lands here in controversy has by conveyance not only passed out of the United States into the State of Louisiana, but by reason of a certain congressional statute of limitation and repose the title so conveyed is no longer subject to attack or suit by or on behalf of the Federal Government, and, therefore, the United States is not, and cannot be made, the real party defendant, for the all-sufficient reason that the United States has no present, prospective or ultimate interest in the land whatsoever. If, therefore, the court shall find that the legal title to the lands in dispute has passed out of the United States into the State of Louisiana, then there cannot be any doubt of the jurisdiction of this court to entertain the suit.

In dismissing the bill the Court refused to let jurisdiction depend upon the plaintiff's allegations. The Court first assumed for purposes of decision that it would have jurisdiction if the United States clearly had no title (p. 75).[34] It stated that at least the case was doubtful upon the merits, and held (p. 77):

> But that doubt cannot be resolved in this case. It raises questions of law and of fact upon which the United States would have to be heard.

Thus it was clearly held that although on the theory and allegations of the bill the United States had no interest, nevertheless in substance it was the real party in interest. The allegations of the com-

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[34] This assumption may have been intended merely to avert the implications of the state's contention that the defendants should not be permitted to claim immunity since they were violating the law (p. 73). The state relied upon federal statutes which marked out the defendants' duties and the Court might have felt that their actions could have been reviewed, if indisputably erroneous, by analogy to the rule in mandamus, since in an appropriate case the writs of injunction and mandamus are correlative to each other. *Noble* v. *Union River Logging Railroad*, 147 U. S. 165, 171–172 (cited by the State of Louisiana, 211 U. S. at 73).

In the present case, however, there are doubtful issues which will not be settled even if a decision is rendered on the merits as to the corporate defendants in No. 6. There are additional grounds for holding valid the pledges to secure the Canal Zone accounts (*supra*, pp. 18–43). Moreover, the present case does not involve federal statutes imposing duties upon petitioners, which might afford an analogy to the procedure by way of mandamus even if plaintiffs should be clearly right.

plaint are not controlling. See also *Morrison* v. *Work,* 266 U. S. 481.[35]

(c) Upon analysis, *United States* v. *Lee* is seen to turn upon the fact that the action was ejectment. Accordingly, as the Court was careful to note, the action was one against individuals to recover *possession* (see 106 U. S. at 210, 219). The United States would not be bound by a judgment in ejectment against its officers. See 106 U. S. at 217, 222; *Carr* v. *United States,* 98 U. S. 433; *Hussey* v. *United States,* 222 U. S. 88, 93. But this inconclusiveness was already inherent in the common-law action of ejectment, which was an action for possession, not for seisin or title, and, indeed, a judgment was not conclusive upon the right of property even between the parties.[36]

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[35] In this case the Court dismissed a suit to enjoin the Secretary of the Interior from carrying out certain acts of Congress upon the ground that they unconstitutionally deprived the plaintiff and other members of an Indian tribe of property held by the United States for them as individuals. It was admitted that the acts were valid as to tribal property. The Court said that the claim of the United States that the property was tribal was at least a substantial one; that interference with its disposition of the lands by enjoining its officials would interfere with the performance of governmental functions and vitally affect interests of the United States; and that hence the United States was an indispensable party.

[36] *Sedgwick & Wait*, Treatise on Trial of Title to Land (2d ed. 1886), c. 1, secs. 41, 42, printed also in *3 Select Essays in Anglo-American Legal History*, pp. 611, 629; *Adams*, Ejectment, p. 351; *Freeman*, Judgments (5th ed. 1925), sec. 860; *3 Blackstone*, Commentaries (pp. 200–207).

One year later, Justice Miller considered his opinion in the *Lee* case in *Cunningham* v. *Macon & Brunswick R. R. Co.,* 109 U. S. 446, and stated that the *Lee* case merely upheld an action in tort, ejectment being essentially an action of trespass, against individuals whose accountability to judgment and surrender of possession would not conclude the United States. The rule was shown to be different where the plaintiff advanced a claim of more than possession and revealed that the adverse party was the sovereign itself. In the *Cunningham* case, certain bondholders sued to foreclose their mortgage. The railroad had been seized under a lien by the Governor of Georgia and delivered to a receiver who sold it to the state. However, the plaintiffs alleged, *inter alia,* that the sale was absolutely void, the acquisition of title being beyond the constitutional power of the state (pp. 448, 459) and also because certain of the land was subject to plaintiff's lien but not the state's. As Justice Harlan's dissent pointed out, the officers were holding possession on behalf of the state but the plaintiffs were claiming that the alleged title of the state was not valid, and that a decree rendered in the absence of the state would not bind her (pp. 464, 465). Nevertheless, the Court dismissed the suit on the ground that the defendants sued had no personal interest in the matter, the entire interest adverse to plaintiffs being in the state.

Where the complaint rests upon an underlying claim of right which is opposed by the United States as the real party in interest, the Court will not entertain an action without the presence of the United States although the United States would not be bound in any event.[37] The principle has recently been supported by the decision in *Arizona* v. *California,* 298 U. S. 558, 571–572:

> Although no decree rendered in its absence can bind or affect the United States, that fact is not an inducement for this Court to decide the rights of the states which are before it by a decree which, because of the absence of the United States, could have no finality. *California* v. *Southern Pacific Co.,* 157 U. S. 229, 251, 257; *Minnesota* v. *Northern Securities Co.,* 184 U. S. 199, 235,

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[37] More recently the distinction between a mere possessory action against a government official and one brought to try title was recognized in the case of *Appalachian Electric Power Co.* v. *Smith*, 67 F. (2d) 451 (C. C. A. 4th—1933), wherein the court said, p. 456:

"* * * The United States, not having consented to be sued, cannot be made a party defendant. *Carr* v. *U. S.*, 98 U. S. 433, 25 L. Ed. 209; *U. S.* v. *Turner* (C. C. A. 8th), 47 F. (2d) 86. Consequently, plaintiff's suit to quiet title will not establish title against the adverse claimant, and any relief which the court may grant will be nugatory. Ejectment would lie, because in that action relief is sought, not against the claim of the government, but against the wrongful possession of the government's agent. *U. S.* v. *Lee*, 106 U. S. 196, 1 S. Ct. 240, 27 L. Ed. 171. In a suit to quiet title, however, the matter in issue is the title itself; and no effective relief can be granted unless the adverse claimant is a party to the suit."

245–247; *International Postal Supply Co.* v. *Bruce,* 194 U. S. 601, 606; *Texas* v. *Interstate Commerce Comm'n,* 258 U. S. 158, 163. A bill of complaint will not be entertained which, if filed, could only be dismissed because of the absence of the United States as a party. *Louisiana* v. *McAdoo,* 234 U. S. 627.

The present case does not involve a tentative dispute over possession, or even a hypothetical allegation that the bank's bonds were seized by individual trespassers, but rather a legal right to the proceeds of the bonds. The allegations show that the bonds were pledged under a contract with the Canal Zone, that the proceeds of the bonds were yielded to the pledgee Zone, and that the plaintiff accordingly seeks to impress a trust upon the proceeds in a Canal Zone checking account. The defendants have no personal interest; the United States has the entire interest adverse to plaintiff's claim of ownership of the bonds. It is for Congress to determine whether the Canal Zone's right to retain the proceeds may be heard in court or before any body other than itself. Compare *Leather* v. *White,* 266 U. S. 592, affirming 296 Fed. 477 (C. C. A. 7th);[38] *Cunningham* v. *Macon & Brunswick R. R. Co., supra.*

[38] Minority stockholders of a corporation brought suit against the agent of the United States on certain land, alleging that the land was corporation property which had been misappropriated by majority stockholders and directors who

Reference may also be made to *Ickes* v. *Fox et al.*, 300 U. S. 82. Plaintiffs, alleging a vested ownership of certain water rights, brought suit to restrain the Secretary of the Interior from enforcing an order diminishing those rights. A motion to dismiss alleged that the water rights were in the United States, that therefore the plaintiff's claim rested solely upon certain contracts with the United States, and that the relief sought was in substance the specific performance of the contracts (p. 96). In holding the United States not an indispensable party, the Court held that it would presume plaintiff had correctly alleged ownership of the water rights (p. 96).

We suggest in the first place that the reasoning of *Ickes* v. *Fox et al.* should be disapproved as resting upon the manifestly untenable premise that the plaintiff alone, in phrasing his complaint, may determine whether to concede that the United States has even a sufficient claim of title to permit it to invoke its sovereign immunity. The decision is not in harmony with several other cases decided by this Court and not discussed in the opinion. E. g., *Louisiana* v. *Garfield, supra; Oregon* v. *Hitchcock,*

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thereby created a fraudulent title to the land and transferred it to the United States. The lower court held that since the complaint prayed recovery of the land, the United States was an indispensable party. This Court affirmed without opinion.

supra; Morrison v. *Work, supra.*[39] In any event, *Ickes* v. *Fox* is distinguishable from this case, because the Court treated the question of property as an incidental part of plaintiff's case which was primarily a protest against interference with that property through the abuse of governmental power, citing *Philadelphia Co.* v. *Stimson,* 223 U. S. 605 (cf. discussion *infra,* p. 87). The present case is solely a proceeding to determine the rights to the proceeds of the bonds.

(d) The same result is reached, moreover, if the present case is approached in wholly different fashion. Respondent, in attacking the pledge to the Canal Zone as *ultra vires,* necessarily must admit that the United States has some interest in the proceeds and hence is an indispensable party defendant.

In *Texas & Pacific Ry.* v. *Pottorff,* 291 U. S. 245, the Court stated that no rights arise on an *ultra vires* contract. Viewed in context, this statement indicates that, upon the merits, if the pledge were *ultra vires,* the Canal Zone cannot insist upon any right against the receiver's attack. If the pledge were *ultra vires,* the receiver has the power, and even the duty, to take action to set aside an *ultra vires* transaction (see 291 U. S. at 260–261), but he

[39] Perhaps the case can be reconciled on the ground that the claim of the United States was not "substantial" and that the Secretary could be enjoined from committing an indisputable wrong. See *supra,* footnote 34.

would set it aside by suing the pledgee in order to terminate his interest, as in *Marion* v. *Sneeden,* 291 U. S. 262. The *Pottorff* case was not intended to overrule *Pullman's Car Co.* v. *Central Transportation Co.,* 171 U. S. 138, 151. In that case, where a corporation had no power to transfer its property under lease, the Court held that an action for the recovery of property transferred under an illegal contract is founded upon principles of justice and an implied promise to return it.[40] See also *Logan County Bank* v. *Townsend,* 139 U. S. 67; *Citizens' National Bank* v. *Appleton,* 216 U. S. 196; *Kerfoot* v. *Farmers' & Merchants' Bank,* 218 U. S. 281. It follows that, until execution of the judgment, the present holder has an interest in the property.

Though the obligation of an *ultra vires* contract is void, a transfer under the contract may pass title provided the parties intended title to pass and performed the requisite formalities. See Judge Learned Hand in *Metropolitan Trust Co.* v. *McKinnon,* 172 Fed. 846, 849–850 (C. C. A. 2d). We submit that even where a pledge is *ultra vires,* the pledgee does have *some* interest in the assets, subject to an implied promise to return them to the transferor. It is not disputed that the pledge was

[40] This doctrine would also support a suit in equity, upon a constructive trust against the pledgee—in this case, the Canal Zone. It may be doubted whether the court below was correct in holding the Fleet Corporation liable in damages for conversion (No. 6, R. 113).

voluntary and was intended to confer the rights of a pledgee upon the Canal Zone, and that the bank and the Comptroller of the Currency intended to pass title to the proceeds to the Canal Zone. Cases relied upon by respondent involving forcible takings, such as *United States* v. *Lee,* 106 U. S. 196, are accordingly not in point. Since in the present case the Canal Zone obtained some interest in the pledged bonds and in their proceeds, the United States is an indispensable party defendant.

In any event respondent must recognize that the moneys comprised in the Canal Zone account in the Hamilton Bank, or any other funds or bonds, which are the proceeds of the bonds once owned by the Bank, are not property to which he has title. Indeed, the very bringing of a suit to impress a constructive trust is recognition of an outstanding legal interest which plaintiff seeks to have impounded for his benefit. As stated in *In re Barney* [1892], 2 Ch. 265, 273, even a trustee *de son tort* must have "property either actually vested in him, or so far under his control that he has nothing to do but require that, * * * it should be vested in him." See also *Bogert,* Trusts and Trustees, sec. 471, n. 1. The cases impressing a constructive trust speak in terms of the possession by the defendant of such a legal title. See e. g., *Chapman* v. *County of Douglas,* 107 U. S. 348, 355–358; *Angle* v. *Chicago, St. Paul, etc., Ry.,* 151 U. S. 1, 26; *Prosser* v. *Finn,* 208 U. S. 67, 73; 3 *Pomeroy,* Equity Juris-

prudence (4th ed.), sec. 1044; *American Law Institute,* Restatement, Restitution, sec. 160, p. 641, 8.

The Canal Zone undoubtedly has a legal interest in the account in the Hamilton Bank. The legal interest applies to the entire account, whether or not equitably some of the funds should be turned over to respondent. Duly authorized officials other than petitioners would have authority to draw on such account. Nor could any drawing be effected, consonantly with valid regulations outstanding, for a purpose other than Canal Zone public purposes. Petitioners could not withdraw funds for a personal purpose. This legal interest of the Canal Zone seems indisputable and cannot be terminated in the absence of the Canal Zone or the United States as a party.

A suit upon a constructive trust requires, of course, a tracing of the trust *res. Texas & Pacific Ry.* v. *Pottorff,* 291 U. S. 245, 261. This consideration was not referred to by the court below, which apparently assumed, correctly or not, that in this case respondent had sufficiently traced the proceeds of the pledged bonds. Yet explicit study of the requirement that the *res* be traced illumines the interference with the sovereign implicit in a suit such as that maintained by respondent. The sovereign would surely have an interest in seeing that the court does not, by an incorrect rule of tracing, reach into funds which are admittedly the property of the Government. See (1937) 46 Yale

L. J. 538, 541–542. This interest alone should suffice to make the sovereign an indispensable party, especially since the rules of tracing are not crystallized, and the tracing disputes which have pervaded private controversies may become even more involved in the meshes of government organization and finance. Vindication of the equitable right of the suitor might well plunge courts into an exploration of government financial practices which could hardly be thought an appropriate judicial function.

(e) The judgment in this very case illustrates how even the admitted interests of the United States may be affected by an action to recover property equitably belonging to the plaintiff. The judgment provides (R. 23) that the defendants pay over $207,361.41, approximately the amount of the proceeds (R. 3), with interest from September 24, 1933, to September 25, 1933, as of which date a credit of 50% dividend on plaintiff's claim, in the sum of $103,680.70, is credited, the balance to bear interest at the legal rate from September 25, 1933, to December 7, 1936, as of which date a 25% dividend amounting to $51,840.35 is credited, the balance to carry interest until paid. It seems plain that if the judgment were only one for the recovery of plaintiff's property it should not carry interest at the legal rate but at most the amounts earned on that property, by way of interest paid by the Hamilton National Bank, etc. The plaintiff is obtain-

ing 6% interest from the Canal Zone, although the Canal Zone obtained less from the bank, and the difference, obviously, will be paid out of funds to which the Canal Zone is concededly entitled. To this extent, the judgment operates to obtain the unauthorized payment of interest by the United States, and must therefore, under any view of the case, be reversed.

(f) We have assumed that the Canal Zone deposit money order and money order funds deposited in the bank now being liquidated by respondent constituted moneys or property of the United States. We do not understand respondent to deny this.[41] But the opinion of the Court of Appeals, which is not clear, may have denied this proposition. (See R. 114, No. 6.)[42]

Defendants' pleadings clearly averred that the deposits in the respondent bank "were of monies of the United States," that the proceeds of the bonds were deposited for the credit of the United States, and that judgment against the defendants "would affect materially the United States in respect of its

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[41] The brief in opposition (p. 15) states that the petition makes a basic and erroneous assumption in overlooking a fundamental distinction between the original deposit by the Secretary of War and the money now on deposit with the Hamilton National Bank.

[42] See also R. 118 where the court relied on *O'Connor* v. *Rhodes*, 79 F. (2d) 146, where it considered the moneys of the Alien Property Custodian in question as moneys belonging eventually to private owners (p. 152). But cf. *Cummings* v. *Hardee*, 102 F. (2d) 622.

resources and assets." See paragraph 7, separate defense numbered 1 (R. 16); see also paragraph 9 (R. 20).

We see no basis for a contrary argument.[43] The moneys were collected by the Canal Zone and received by the Collector of the Panama Canal, the officer who collects amounts due the Canal Zone (Circular No. 660–2, Appendix, pp. 25–27). For purposes of administrative convenience they may be regarded as Canal Zone funds rather than United States funds which must be covered into the Treasury.[44] But the Canal Zone is merely one aspect of the Government of the United States (see *supra,* p. 45). The removal of those funds diminishes the resources of the United States. The public character of the funds is not lost because thereafter the Canal Zone deposited these funds in a bank. *Murray* v. *Wilson Distilling Co.,* 213 U. S. 151; *Lankford* v. *Platte Iron Works,* 235 U. S. 461; both cited *supra,* p. 52.

It is true that the moneys deposited were composed of funds with which residents of the Canal

[43] Defendants did aver, in a somewhat confusing manner, that the funds in question are not "public moneys" or "public funds" in the technical sense of having to be covered into the Treasury, or being subject to the official control of the Secretary of the Treasury. See paragraph 9, R. 20.

[44] An indictment for embezzling fines received in a Canal Zone magistrate's court was held not demurrable for laying ownership in the Panama Canal rather than the United States. *Fullerton* v. *Government of the Canal Zone,* 8 F. (2d) 968 (C. C. A. 5th).

Zone purchased money orders and deposit money orders. The receipt of these moneys by the Canal Zone undoubtedly gave rise to a debtor-creditor relationship. Although the Canal Zone undertook an obligation to make repayments, the moneys received became the funds of the Canal Zone, owned by the Canal Zone. Under any view, the interest on the deposit became part of the general revenues of the United States. (See R. 20, par. 9.) And it may be noted that profits from the Canal Zone postal service have been, from time to time, covered into the Treasury. Congress has plenary control over the money order funds and deposit money order funds. Congress provided for their disbursement to cover deficiencies in the postal service (see *supra,* pp. 23, 40).

Even if the property rights of the United States were less extensive than those outlined, its sovereign immunity might preclude this suit. See *Lankford* v. *Platte Iron Works,* 235 U. S. 461.[45]

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[45] There a depositor in an insolvent state bank brought suit to compel payment of his deposit by the State Banking Board out of the Depositors' Guaranty Fund. The Oklahoma Bank Guaranty Law provided that each bank should pay a small sum annually into a Guaranty Fund to be used by the State Banking Board to liquidate the deposits of failed banks. The Fund was not placed in the state treasury but was kept on deposit in the contributing banks. The plaintiff asserted that the suit was not against the state, since the Fund was not under the executive and legislative control of the state and could constitutionally be used solely for the purpose of paying depositors of failed banks. The Court held that the suit was against the state since the state

3. The suit affects governmental interest of the United States in discharging its obligation to the original depositors of the funds

The foregoing discussion has been predicated simply upon the direct monetary loss to the United States. But apart from pecuniary injury, a suit must be dismissed "where the State has otherwise such an interest in the object of the suit as to be a necessary party." *Belknap* v. *Schild,* 161 U. S. 10, 18. Cf. *Louisiana* v. *McAdoo,* 234 U. S. 627, 632, where a suit was dismissed as one which would affect governmental interests and "clog the wheels of government." In *Lankford* v. *Platte Iron Works,* 235 U. S. 461, the state had only a bare legal title to the depositor's guaranty fund involved, but yet the Court held the suit must be dismissed because of the state's interest in the administration of the fund. And in *Morrison* v. *Work,* 266 U. S. 481, the Court dismissed a suit on the ground that it interfered with the United States as guardian of a tribe of Indians and trustee in possession of the property. Similarly, the United States here is an indispensable party defendant because its governmental interests have obligated it to make payment

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had legal title to the Fund, and had an interest that the Fund be administered by the officers it had appointed. It seems plain that the interest of the United States is much stronger than that of Oklahoma in the *Lankford* case, since Oklahoma acquired a bare legal title over the funds and lacked legislative or executive control over them.

to the holders of the money orders and deposit money orders.

It seems indisputable that this fund represents a direct obligation of the Canal Zone, and thus of the United States, at least in one of its aspects.[46] It may be noted that section 9 of the Executive Order of September 8, 1911 (Appendix, pp. 20–21). setting up the Canal Zone postal savings system, expressly provided that payment pursuant to a court decree should operate as a "discharge of the United States and the Canal Zone Government from the claim or demand" of any person to the same. The Court of Appeals dismissed this branch of the argument with the terse statement that there was only a "moral obligation" (R. 118, No. 6). If it were not for the inability to sue the Canal Zone, there would have been an indisputable legal obligation. Compare *The Western Maid,* 257 U. S. 419. But if a decree will effectively deprive the United States of the means of discharging such an obligation, legally enforceable against a nonsovereign, the suit is one against the United States. *Kansas* v. *United States,* 204 U. S. 331.

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[46] Indeed, it may be, at least as to the deposit money orders, that the depositors are secured by the "faith of the United States" *eo nomine*, which is pledged to the payment of United States postal savings (39 U. S. C., Sec. 766). The Canal Zone Postal Service is governed by such rules of the U. S. Postal Service as apply to conditions in the Canal Zone. See Act of February 16, 1933, etc., discussed *supra*, pp. 40 *et seq.*

In *Kansas* v. *United States,* a suit was brought to establish title to certain lands which had been allotted in severalty to individual members of the Creek Nation, the bill praying that the allottees be directed to surrender possession. The Court held that the United States was the real party in interest as defendant, and as to this aspect of the case, stated (p. 342):

> * * * and if their allotments should be taken from them, which is part of the relief sought by the bill, the United States would be subject to a demand from them for the value thereof or for other lands, * * *.

It was not suggested that the Indians could in any way have enforced this demand.

Sloan Shipyards v. *U. S. Fleet Corp.,* 258 U. S. 549, cited by respondent (Br. in Opp., p. 14), is not to the contrary. In that case the United States gave its consent to suit.

We recognize that personal actions against an individual agent cannot be defeated on the ground that Congress might decide to save the defendant harmless. The interests of the United States are more directly affected when the decree takes away property which was available to the United States for the discharge of an "obligation" already subsisting, and an obligation of a type which would be legally enforceable as to an ordinary debtor. Especially is the United States the real party in interest when, in the present case, as in *Kansas* v.

United States, the discharge of such obligation constitutes an appropriate governmental function. It will hardly be denied that the agreement to pay the stated sums to the holders of the money orders and deposit money orders, undertaken at the time of the receipt of the moneys, represents a legitimate governmental interest. The savings and deposit money order systems were encouraged, and made interest-bearing, to promote thrift among the governmental employees. See H. Rept. No. 1083, 67th Cong., 2d Sess., p. 16.

C. THE PRESENT SUIT IS AN ACTION AGAINST THE DEFENDANTS IN THEIR OFFICIAL CAPACITY

We have shown above that the present suit affects the interests of the United States as the real party in interest. Upon an alternative approach, it is seen that the present suit is being maintained against each petitioner in his official, and not his individual, capacity.

1. *The suit cannot be maintained against petitioners in their official capacity*

Notwithstanding the doctrine of sovereign immunity, this Court has entertained actions against governmental officials if sued in their individual rather than in their official capacity, if sued as individual defendants, who act under color of authority of unconstitutional legislation by the state. *In re Ayers, supra,* 123 U. S. at p. 506; *Philadelphia Co.* v. *Stimson, supra,* 223 U. S. at pp. 619–620;

Cunningham v. *Macon & Brunswick R. R. Co., supra,* 109 U. S. at p. 452. But, except for injunction or mandamus suits relating to acts purely ministerial (*In re Ayers, supra*) this Court will dismiss suits not consented to by the sovereign where the plaintiff seeks to control the defendants "in their official capacity." *Belknap* v. *Schild, supra,* 161 U. S. at 25; *Hagood* v. *Southern,* 117 U. S. 52, 69; *Cunningham* v. *Macon & Brunswick R. Co., supra,* 109 U. S. at 457; *Worcester County Trust Co.* v. *Riley, supra,* 302 U. S. at 296.

The Court of Appeals seems to be of the impression that an officer in possession of a fund can be "sued in his official capacity in a possessory action." *Cummings* v. *Hardee,* 102 F. (2d) 622, 628. The decisions just referred to, among many others, show that in the absence of consent by the United States, actions may be maintained against officers only in their individual capacity.

All the decisions sanctioning recapture of property from government officials are based upon this premise. The *Lee* case insisted that the ejectment action against the army officials in charge of a national cemetery was one "against Strong and Kaufman, as individuals, to recover possession of the property." 106 U. S. at 210; see also p. 219.[47]

[47] The *Lee* case was followed in *Scranton* v. *Wheeler,* 179 U. S. 141, and applied to state officers in *Tindal* v. *Wesley,* 167 U. S. 204. The defendant sued must actually be in possession. *Walker* v. *Ford,* 269 Fed. 877 (App. D. C.).

The Court relied upon *United States* v. *Peters,* 5 Cranch 115, where it was held that the claim of the State of Pennsylvania could not preclude inquiry into the title of certain certificates which the Treasurer of the State had retained as his private property (until the State should indemnify him against a specified liability), and which he kept in his private possession, drawing interest thereon, and passing them on to his executrices. And in *Cunningham* v. *Macon & Brunswick R. R. Co., supra,* the *Lee* case was explained as an action essentially one in trespass, i. e., one in tort, against a defendant who " is not sued as, or because he is, the officer of the government, but as an individual"—(109 U. S. at 452).

Similarly, actions in other cases brought to terminate possession of personal property were brought against the various defendants as individuals. In *Osborn* v. *United States Bank,* 9 Wheat. 738, notwithstanding an injunction restraining the auditor of Ohio from collecting a tax under an unconstitutional statute, his agent forcibly took from the Bank $100,000 in specie and bank notes, and turned this over, at least to the extent of $98,000, to the state treasurer, who retained it separately in a trunk, and in turn delivered it over to his successor. This Court ordered restitution of the $98,000 and directed payment of the remaining $2,000 by the original collector. The opinion regarded the suit as brought against the

defendants as individual trespassers, and concluded that the money turned over in violation of the injunction might be pursued so long as it remained a distinct deposit.[48]

In *Poindexter* v. *Greenhow,* 114 U. S. 270, the Court entertained an action in detinue for a desk seized by a trespasser—a tax collector who acted under an unconstitutional law. See also *Goltra* v. *Weeks,* 271 U. S. 536.[49]

Each of these cases involved a common law possessory action to require defendant to turn over an article or chose in his possession, an action maintained against him personally.

2. The basis and object of the present suit shows that it is one against the defendants in their official capacity

This suit was commenced against Secretary Dern. Even if he were liable as an individual in

[48] The Court also concluded that even if the original injunction had not been properly awarded, since the money taken from the Bank had been detained in a specific form, detinue would lie without any obstacle because of the interest of the State (pp. 858, 867–868). This aspect of the case seems to have been disapproved. See *infra*, pp. 85–86.

[49] The complaint alleged that a fleet of boats, leased from the United States was forcibly seized by an army officer in pursuance of an alleged conspiracy with the Secretary of War to take them without lawful right. Restoration of the boats was prayed, and also injunction against further disturbance. The Court took jurisdiction of the suit as one seeking to enjoin a trespass threatened by an official acting in abuse of his powers, but held the plaintiff not entitled to possession.

tort, it does not follow that Secretary Woodring is likewise liable. *Union Trust Co.* v. *Wardell,* 258 U. S. 537, 542. Secretary Woodring has been substituted into the action, and it is essential for plaintiff to show the personal liability of Secretary Woodring, i. e., to assert a ground of liability which might have been asserted as a basis for *commencing* an action against Secretary Woodring. *Ex parte La Prade,* 289 U. S. 444; Cf. *Allen* v. *Regents,* 304 U. S. 439, 444, where it was alleged that the successor collector would have collected the tax, unless restrained.

(*a*) *The relief sought involves judicial control over the exercise by petitioners of official functions.*—In *United States* v. *Lee, Osborne* v. *United States Bank,* and *Poindexter* v. *Greenhow, the* Court was able to say that the action was one against defendants in their capacity as individuals because the common law forms of action employed required the defendants to turn over possession of property, and this is relief which may be prayed of any individual.

Respondent does not allege that petitioner Woodring possesses any of plaintiff's property. The suit as to Secretary Woodring is apparently based upon his alleged possession of the proceeds of the bonds, a suit to establish a constructive trust. Plaintiff cannot even pretend to ask merely for a decree terminating defendant's personal possession, but must instead pray that Secretary Wood-

ring withdraw funds from the "Secretary of War, Canal Zone Funds" account in The Hamilton National Bank. This withdrawal from the Canal Zone bank account is the implicit crux of plaintiff's case.

The complaint alleges that the proceeds of the bonds, the deposit in the Hamilton National Bank, "became a trust fund for the benefit of the depositors * * * and, as such, are recoverable by plaintiff from said Secretary of War and said General Purchasing Officer of the Panama Canal, together with interest on said sums of $214,739.80 and $3,535.37 at the legal rate from September 24, 1933" (R. 3). The prayer for an accounting for these sums, with interest (R. 6), and the award of a money judgment in similar terms (R. 24), necessarily proceed upon the premise of Secretary Woodring's withdrawal from this account. Although an action theoretically might call for a surrender of personal possession without in any way implicating the sovereign behind the officer, it is plain that respondent's suit involves action not attributable to individuals but only to officials of the Canal Zone Government. The action seeks to control petitioners' exercise of official powers.

It is interesting to observe that although the complaints contain a saving allegation that the defendants are sued in both individual and official capacities (par. 5 (b)), each complaint later described the moneys as claimed from the defendants

"in connection with their official position relating to the Panama Canal" (R. 6, par. 9; No. 6, R. 11, par. 16);[50] and each complaint prays that Dern and Flint, "as Secretary of War and General Purchasing Officer and Chief of Washington Office, The Panama Canal, respectively, or their successors in office" be required to account for the sums (R. 6). And the decree was rendered against their successors in office. Compare *Hagood* v. *Southern,* supra, 117 U. S. at 69; *Governor of Georgia* v. *Madrazo,* 1 Pet. 110 at 123.

Finally, this action not only requires the exercise of official functions, but it requires their exercise in a manner not authorized by statute. Compare *Louisiana* v. *Jumel,* 107 U. S. 711, 721; *Cummings* v. *Hardee, supra.* Congress has provided for the appropriation of the funds in the control of the petitioner for two purposes—the repayment of the money orders and deposit money orders; and, to the extent of any "profit," the application to the deficit in the Canal Zone postal service. See Act of February 16, 1933, section 1, Appendix, p. 9.[51] There is no statutory appropria-

[50] Respondent in this case claimed the proceeds of the bonds (R. 3, par. 6), and respondent in No. 6 claimed the bonds or if sold the proceeds (R. 7, No. 6, par. 12).

[51] Any further excess (none so far has occurred, or seems probable) would presumably be covered into the Treasury of the United States, as was done with respect to $2,000,000, money order funds at a time when Congress had not made complete provision for their appropriation.

tion pursuant to which they can be devoted to the judgment in question.

(*b*) *The suit is based upon enrichment, and not mere possession.*—The personal possession which was the basis of the *Lee* and *Osborn* cases is a characteristic which can be asserted of any individual. When an action is based upon possession, there is some color for avoiding the doctrine of sovereign immunity by claiming to desire only that the personal possession of the defendant be terminated, and by ignoring the fact that he not only had personal physical possession but also had official possession. However, the constructive trust is an equitable doctrine utilized in cases of wrongdoing to avoid unjust enrichment (see *supra,* p. 49). Plainly, petitioners Woodring and Smith have not been *personally* enriched by any control of the proceeds of the bonds once transferred by the bank. The petitioners acquired control of the proceeds solely by virtue of their official position. Unless this Court affirms the result below, they will either use the proceeds in the course of their official duties or transfer them to their successors in office. Thus, in *Belknap* v. *Schild,* 161 U. S. 10, 26, the Court dismissed a suit for profits brought against an army official using a caisson gate in infringement of a patent and pointed out that the defendants themselves had not made any profits in addition to the gain to the United States from the saving in the cost of the gate. Similarly, here, at most it is the

defendants in their official capacity, i. e., representing the Canal Zone, who are unjustly enriched.

Petitioners have no legal interest in the proceeds as individuals, nor any right to vest such interest in themselves as individuals, nor have they appropriated the moneys to their own use, and in such circumstances a constructive trust cannot be established against them as individuals.[52] The same analysis would apply even if the proceeds of the bonds were, say, other bonds. In a careful pleading, personal possession might be predicated of Secretary Woodring without involving the United States; personal ownership or advantage, or enrichment, could not. No constructive trust action could be brought against the proceeds in his possession except upon a claim of right to proceed against the one for whom the proceeds were held, and that one being in this case the Canal Zone or the United States, the suit would have to be dismissed.

Governor of Georgia v. *Madrazo*, 1 Pet. 110, indicates that an equitable claim cannot be asserted against an officer in possession of property. A cargo of slaves belonging to Madrazo was seized by a privateer, and sold by an unrecognized tribunal to a person who brought them into Georgia. There

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[52] See *supra*, p. 65, citing *In re Barney* (1892), 2 Ch. 265, 273; Bogert, Trusts and Trustees, sec. 471, n. 1, and other authorities. Bogert cites *Allen* v. *Sarshik*, 299 Pa. 257, as holding it not necessary that the constructive trustee have legal title, but in that case the defendants appropriated money to their own use (pp. 262–263).

the slaves were seized, under an 1807 Act of Congress, and by a Georgia statute placed under the control of the Governor. The Governor sold the greater number of the slaves and paid the proceeds into the treasury. The court held that Madrazo's libel against the Governor for the restitution of the slaves should be dismissed as one against the state, that the demand was made upon the Governor, not personally but officially, that the decree below for restitution was pronounced, not against the person, but the officer, and indeed against the successor of the original defendant. The terse paragraph of the opinion apparently holds, *inter alia,* that no equitable claim to the slaves could be enforced against the Governor personally, since he had no personal interest in the slaves.[53]

(*c*) *The proceeds were not taken by petitioner Woodring, a successor officer whose possession is entirely official.*—Even if the present suit were not an attempt to declare a constructive trust, and were an action to recover the very bonds which once belonged to the insolvent bank, the doctrines established by this Court do not permit the recovery of negotiable securities except from the

[53] See *Karl Singewald*, The Doctrine of Non-Suability of the State in the United States (p. 55):

"The slaves had come into his [the Governor's] possession in perfectly lawful manner. The action, therefore, was not against him for wrongful possession, but rather in the nature of a suit to enforce an equitable claim to the slaves. Since the Governor had no personal interest in the slaves, the claim was not against him."

official by whom they were unlawfully taken. For even actions based on the officer's possession must allege that the possession is a personal rather than an official possession.

In *Osborn* v. *United States Bank,* 9 Wheat. 738, the court stated that since a person injured by the collection of a tax could bring an action in damages against the collector, he could also "sue for the specific thing, while yet in possession of the seizing officer" (p. 854). And in *Poindexter* v. *Greenhow,* 114 U. S. 270, 295, permitting an action of detinue against the tax collector, the court similarly explained that the action of detinue was essentially defensive in character, an action to resist an attempted wrong.[54]

In subsequent opinions in which this Court has distinguished suits where the state is the real party in interest from suits against an official as a tort feasor the scope of the latter type of suit was stated as including actions for damages, suits for injunctions, and actions "brought to recover money or property in the hands of such defendants, *unlawfully taken by them* * * *." *Pennoyer* v. *McConnaughy,* 140 U. S. 1, 10. The same qualification

[54] The defensive nature of this action was important to the decision, for this Court has pointed out the significance, in showing a suit to be one against a state, of a prayer for affirmative relief against the official. *Pennoyer* v. *McConnaughy,* 140 U. S. 1, 16; *Cunningham* v. *Macon & Brunswick R. R. Co.,* 109 U. S. 446, at 453, 454.

appears in *In re Tyler,* 149 U. S. 164, 190; *Scott* v. *Donald,* 165 U. S. 58, 68.

In a suit to recover brought against the original taker the court steps in before the taker has turned the property over to his government. It is possible to think of him as an ordinary individual trespasser. However, when the property has been turned over to another official, a successor in office, or an auditor, etc., clearly, the latter's possession occurs only by virtue of his official capacity. When money is turned over to a successor in office, "he receives it officially" to apply to the purposes for which it had been retained. *Broome* v. *United States,* 15 How. 143, 158.

Actions to recover real property, as in *United States* v. *Lee,* may be put to one side, since any defendant in possession is regarded as a current trespasser. As to personalty, there is only one trespass, the taking. The possession of any official other than the one who originally seized the property occurs in the course of his official duties. *Governor of Georgia* v. *Madrazo,* 1 Pet. 110, *supra,* p. 82.

It is recognized that in *Osborn* v. *United States Bank, supra,* p. 84, the Court gave judgment for possession against the treasurer of the state, and, indeed, his successor. In this aspect, however, the case has been restricted to the ground that the money was turned over to the treasurer in violation of an order of injunction, so that the decree

of restoration corrected this violation of the injunction. *Cunningham* v. *Macon & Brunswick R. R. Co.,* 109 U. S. 446, 455. See note 48, *supra,* p. 77. The money was regarded as in law "kept out of the treasury." *Louisiana* v. *Jumel,* 107 U. S. 711, 725. Compare *Jones* v. *Securities Commission,* 298 U. S. 1, 16, noting generally that upon the filing of a suit for injunction "the hands of the defendant are effectually tied pending a hearing and determination, even though no restraining order or preliminary injunction be issued."

3. The suit cannot be maintained against petitioners as individuals, since they are acting in their official capacity in deciding a doubtful question arising out of a voluntary commercial transaction

In evolving doctrines justifying the maintenance of suits as brought against defendant officials in their individual capacity, this Court has been primarily concerned with the situation of official action taken under the authority of legislation which violates the Constitution. This Court, in some cases at least, has applied "the principle which justifies suits against individual defendants, who, under color of the authority of unconstitutional legislation by the State, are guilty of personal trespasses and wrongs." *In re Ayers, supra,* 123 U. S. at 506; *Osborn* v. *United States Bank, supra.* The essential element of this theory is that the interests of the state or the United States are deemed not involved because it may not be admitted that the state or the United States may violate the Constitution.

The unlawful act is not the wrong of the state, but "is the mere wrong and trespass of those individual persons who falsely speak and act in its name." *Poindexter* v. *Greenhow*, 114 U. S. 270, 290; *Ex parte Young*, 209 U. S. 123, 151; *In re Ayers, supra*, 123 U. S. at 507.

Similarly, this Court has held that the sovereign immunity cannot be claimed by an official acting in excess of his authority, with respect to matters not embraced within the statute giving him authority, or committing an abuse of power. Such an official may be sued at law (e. g., *Little* v. *Barreme*, 2 Cranch 170), or restrained in equity (*Noble* v. *Union River Logging Railroad*, 147 U. S. 165, 171; *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 620; *Ickes* v. *Fox et al.*, 300 U. S. 82).

The Court considered that there were vital considerations leading it to take jurisdiction of actions though it knew that some interest of the state "may be more or less affected by the decision." An official transcending the statute whose warrant he claims is "thus unlawfully assuming to exercise the power of government against the individual owner." *Philadelphia Co.* v. *Stimson, supra*, 223 U. S. 605, at 621–622. And, within the limitations of the judicial process, this Court has endeavored to give protection against abuse of "the power of government."

This protection is the very pith of *United States* v. *Lee*, 106 U. S. 196. The Court insisted (p. 219)

that it could vindicate the plaintiff's "right to recover that which has been taken from him by force and violence, and detained by the strong hand," and continued (pp. 220–221):

> Shall it be said * * * that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without process of law, and without compensation, because the President has ordered it and his officers are in possession?

The cases sanctioning actions for the recovery of property, as do their English progenitors,[55] all bear the impress of these doctrines. The *Osborn* and *Poindexter* cases, entertaining actions in detinue, spell out at length the predication of the action upon the unconstitutionality of the legislation involved. *United States* v. *Lee, supra,* upheld the permissibility of ejectment actions, in order to provide a basis for resisting governmental seizures. See *Tindal* v. *Wesley,* 167 U. S. 204, at 222. And in *Goltra* v. *Weeks,* 271 U. S. 536, the complaint alleged that a fleet of boats was seized by an army

[55] Thus, Lord Mansfield said, in *Mostyn* v. *Fabrigas*, 1 Cowp. 161, 175: "Therefore to lay down in an English court of justice such a monstrous proposition, as that a governor acting by virtue of letters patent under the great seal, is accountable only to God, and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect his Majesty's subjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained."

officer, allegedly under claim of a lease, in pursuance of an alleged conspiracy with the Secretary of War to take them without lawful right. One cannot quarrel with such a decision, for an individual cannot claim to be acting in his official capacity when he acts "with malice, cruelty, or wilful oppression," which are "founded on considerations independent of public ends," *Wilkes* v. *Dinsman,* 7 How. 89, 130.

In some cases, it is true, an official may yet be held accountable for rights violated without resort to the power and strong hand of government. *Cammeyer* v. *Newton,* 94 U. S. 225, 234, for example, held an official liable in damages for patent infringement. But in such cases the Court redresses a violation of plaintiff's rights arising out of a unilateral act on the part of the official rather than out of a participation by plaintiff in a course of dealing with the defendant in his official capacity. The cases speak in terms of the personal liability of officials who have wrongfully "invaded" the plaintiff's property rights. *Philadelphia Co.* v. *Stimson,* 223 U. S. at 619; *Belknap* v. *Schild,* 161 U. S. 10, 18. And in distinguishing between wrongs arising out of voluntary transactions and forcible takings, we may renew our suggestion that the *ultra vires* of the pledge did not prevent some interest from passing to the pledgee, as was intended by the parties. See discussion, *supra,* p. 63 *et seq.*

The present case may be likened to *Wells* v. *Roper,* 246 U. S. 335. The Postmaster General decided to institute a new mail collection service and cancelled plaintiff's contract for the furnishing of automobiles, purporting to act under the terms of the contract. The plaintiff, regarding the cancellation clause as inapplicable, brought suit to restrain interference with plaintiff's performance of the contract. In dismissing the suit as one against the United States, the Court pointed out that the defendant was without personal interest and was acting in his official capacity, although his act may have violated plaintiff's rights. The Court said (pp. 337, 338):

> The argument to the contrary assumes to treat defendant not as an official but as an individual who although happening to hold public office was threatening to perpetrate an unlawful act outside of its functions. But the averments of the bill make it clear that defendant was without personal interest and was acting solely in his official capacity and within the scope of his duties. * * * It cannot successfully be contended that any question of defendant's official authority is involved; it is a mere question of action alleged to be inconsistent with the stipulation under which it purported to be taken; nor can it be denied that the duty of the Postmaster General, and of the defendant as his deputy, was executive in character, not ministerial, and required an exercise of offi-

> cial discretion. And neither the question of official authority nor that of official discretion is affected, for present purposes, by assuming or conceding, for the purposes of the argument, that the proposed action may have been unwarranted by the terms of the contract and such as to constitute an actionable breach of that contract by the United States.

Similarly, in the present case there was a lawful exercise of governmental power. In supervising the affairs of the Canal Zone, the Secretary of War was charged with functions executive in character, and requiring an exercise of discretion. Without doubt, he could have accepted a pledge from a state bank authorized to give security. It need not be considered whether his claim of executive discretion could be rejected in the event that he entered into a clearly illegal contract of pledge. The power of respondent bank to make a pledge for government officials is at least a doubtful one; and there seems little doubt as to the power to pledge security for the specific Canal Zone deposits. We may note an analogy to mandamus cases which may not be dismissed on the ground of sovereign immunity where the defendant is required to perform a plain official duty requiring no exercise of discretion (*Board of Liquidation et al.* v. *McComb*, 92 U. S. 531), but which can not be entertained against an official who is exercising his official dis-

cretion, even though he is wrong (e. g. *Ness* v. *Fisher*, 223 U. S. 683, 691; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324). Compare *Louisiana* v. *Garfield*, 211 U. S. 70, 75; *Morrison* v. *Work*, 266 U. S. 481, 485, discussed *supra*, pp. 56, 71.[56]

In summary, the significant aspect of the present case is that the alleged wrong to the plaintiff arose out of the bank's voluntary commercial transactions with an executive official, dealing with him as such. Cf. *Wells* v. *Roper*, *supra*. There is here no abuse of governmental power, no seizure of plaintiff's property, no "invasion" of plaintiff's rights. There exists none of the coercive elements which, under our theory of government, suggests that the suit may be regarded as one against the officer as an individual. Instead, we have a situation where the bank, and later the conservator yielding up the assets, dealt with the officials as officials representing their government. And now the receiver of the bank is attempting to litigate a doubtful question arising out of this voluntary commercial transaction by asserting that the officials were not really officials at all but merely individual wrongdoers. The case is aptly governed by the decisions on contracts entered into by government officials, where the official is presumed to be

[56] In *United States* v. *Lee*, the court noted that a contrary rule would permit the withholding of possession, however clear the plaintiff's right was (106 U. S. at 219, 220).

acting in his official capacity. *Hodgson* v. *Dexter*, 1 Cranch 345; *Parks* v. *Ross*, 11 How. 362.

D. THIS COURT SHOULD RECOGNIZE THE REAL INTEREST OF THE UNITED STATES IN THIS SUIT

We submit again that the plaintiff's assertion of right to the proceeds presents a controversy in which the defendants have no personal interest and in which the United States is the real party in interest. The suit attempts to reach funds of the Canal Zone, and to require that defendants exercise their official control over such funds. The controversy is one which should be submitted to Congress or a tribunal designated by Congress.

This suit is essentially predicated upon unjust enrichment. The tort actions sanctioned against officers as individuals have hitherto been actions singularly appropriate for the correction and deterrence of coercive action by government officials. Constructive trusts, on the other hand, are available with respect to noncoercive activities. "Unjust" enrichment is commonly found to arise out of fraud and sharp practice, unfair or unconscionable advantage, of abuse of confidential relationships and fiduciary obligations, and, as in the case at bar, of mistake. See *Bogert*, Trusts and Trustees Sec. 474; *American Law Institute*, Restatement, Restitution, passim, and particularly Section 160. The courts will be called upon to unscramble mutual mistakes as in the case at bar, or

to scrutinize activities of officers, undertaken with zeal and the best interests of the government in mind, for the nebulous range of "unfairness" which might appeal to the conscience of the chancellor. A monitory analogy may be found in Congress' reservation for itself rather than the Court of Claims of the adjustment of situations leading to the unjust enrichment of the United States. Thus, in situations where private parties would be subject to quasi-contractual obligations, suits cannot be maintained under the Tucker Act. *Merritt* v. *United States*, 267 U. S. 338; *United States* v. *Minn. Investment Co.*, 271 U. S. 212; *Goodyear Co.* v. *United States*, 276 U. S. 287.

In such situations, Congress may be able to act "justly" in a broad sense, balancing against the equities preferred by complainant matters not strictly relevant in a court room yet worthy of cognizance by statesmen and other practical men. Compare *United States* v. *Algoma Lumber Co.*, 305 U. S. 415.

We recognize that only recently this Court referred to "the present climate of opinion which has brought governmental immunity from suit into disfavor." *Kiefer & Kiefer* v. *Reconstruction Finance Corporation*, 306 U. S. 381, 391. Yet that decision was based upon a construction of legislative intent. Submission of claims to tribunals other than Congress is more properly to be achieved by legislation than by artificially restrict-

ing the conception of what constitutes a suit against the United States. Cf. (1931) 44 Harv. L. Rev. 474. As this Court said in *Hill* v. *United States*, 9 How. 386, 389, with respect to the doctrine of sovereign immunity—

> A departure from this maxim can be sustained only upon the ground of permission on the part of the sovereign or the government expressly declared, and an attempt to overrule or to impair it on a foundation independently of such permission must involve an inconsistency and confusion, both in theory and practice, subversive of regulated order or power. * * *

Since Congress has not consented to the maintenance of this suit, the judgment should be reversed with directions to dismiss the complaint.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment should be reversed.

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APPENDIX

PART A.—STATUTES

1. Statutes Relating to Deposit of Public Money

R. S., Sec. 5153 (12 U. S. C., Sec. 90):

All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: *Provided,* That the Secretary shall, on or before the 1st of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: *Provided,* That the Secretary of the Treasury shall distribute the deposits herein provided

for, as far as practicable, equitably between the different States and sections.

Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State.

R. S., Sec. 3617 (31 U. S. C., Sec. 484):

The gross amount of all moneys received from whatever source for the use of the United States, except as otherwise provided, shall be paid by the officer or agent receiving the same into the Treasury, at as early a day as practicable, without any abatement or deduction on acount of salary, fees, costs, charges, expenses, or claim of any description whatever. But nothing herein shall affect any provision relating to the revenues of the Post Office Department.

R. S., Sec. 3618 (31 U. S. C., Sec. 487):

All proceeds of sales of old material, condemned stores, supplies, or other public property of any kind, except the proceeds of the sale or leasing of marine hospitals, or of the sales of Coast Guard cutters, or of the sales of commissary stores to the officers and enlisted men of the Army, or of materials, stores, or supplies sold to officers and soldiers of the Army or of the sale of condemned Navy clothing, or of sales of materials, stores, or supplies to any exploring or surveying expedition authorized by law, shall be deposited and covered into the Treasury as miscellaneous receipts, on account of "proceeds of Government prop-

erty," and shall not be withdrawn or applied, except in consequence of a subsequent appropriation made by law.

R. S., Sec. 3621 (31 U. S. C., Sec. 495) provides:

> Every person who shall have moneys of the United States in his hands or possession, and disbursing officers having moneys in their possession not required for current expenditure, shall pay the same to the Treasurer, or some public depositary of the United States, without delay, and in all cases within thirty days of their receipt. And the Treasurer or the public depositary shall issue duplicate receipts for the moneys so paid, transmitting forthwith the original to the Secretary of the Treasury, and delivering the duplicate to the depositor: *Provided,* That postal revenues and debts due to the Post Office Department shall be paid into the Treasury in the manner required by law.

R. S., Sec. 5496 (Criminal Code, Sec. 96; 18 U. S. C., Sec. 182):

> Every banker, broker, or other person not an authorized depositary of public moneys, who shall knowingly receive from any disbursing officer, or collector of internal revenue, or other agent of the United States, any public money on deposit, or by way of loan or accommodation, with or without interest, or otherwise than in payment of a debt against the United States, or shall use, transfer, convert, appropriate, or apply any portion of the public money for any purpose not prescribed by law; and every president, cashier, teller, director, or other officer of any bank or banking association who shall violate any provision of this section is guilty

of embezzlement of the public money so deposited, loaned, transferred, used, converted, appropriated, or applied, and shall be fined not more than the amount embezzled, or imprisoned not more than ten years, or both.

2. Panama Canal Statutes

Act of June 28, 1902, c. 1302, 32 Stat. 481:

Sec. 2. That the President is hereby authorized to acquire from the Republic of Colombia, for and on behalf of the United States, upon such terms as he may deem reasonable, perpetual control of a strip of land, the territory of the Republic of Colombia, not less than six miles in width, extending from the Caribbean Sea to the Pacific Ocean, and the right to use and dispose of the waters thereon, and to excavate, construct, and to perpetually maintain, operate, and protect thereon a canal, of such depth and capacity as will afford convenient passage of ships of the greatest tonnage and draft now in use, from the Caribbean Sea to the Pacific Ocean, which control shall include the right to perpetually maintain and operate the Panama Railroad, if the ownership thereof, or a controlling interest therein, shall have been acquired by the United States, and also jurisdiction over said strip and the ports at the ends thereof to make such police and sanitary rules and regulations as shall be necessary to preserve order and preserve the public health thereon, and to establish such judicial tribunals as may be agreed upon thereon as may be necessary to enforce such rules and regulations.

* * * * *

Sec. 7. That to enable the President to construct the canal and works appurtenant

thereto as provided in this Act, there is hereby created the Isthmian Canal Commission, the same to be composed of seven members, who shall be nominated and appointed by the President, by and with the advice and consent of the Senate, and who shall serve until the completion of said canal unless sooner removed by the President, and one of whom shall be named as the chairman of said Commission. * * *

Act of April 28, 1904, c. 1758, 33 Stat. 429:

SEC. 2. That until the expiration of the Fifty-eighth Congress, unless provision for the temporary government of the Canal Zone be sooner made by Congress, all the military, civil, and judicial powers as well as the power to make all rules and regulations necessary for the Government of the Canal Zone and all the rights, powers, and authority granted by the terms of said treaty to the United States shall be vested in such person or persons and shall be exercised in such manner as the President shall direct for the government of said Zone and maintaining and protecting the inhabitants thereof in the free enjoyment of their liberty, property, and religion.

Sundry Civil Appropriations Act of May 27, 1908, c. 200, 35 Stat. 317, 386:

* * * * *

SEC. 3. All funds hereafter collected by the government of the Canal Zone from rentals of public lands and buildings in the Canal Zone and the cities of Panama and Colon, and from the Zone postal service, and from court fees, and collected or raised by taxation in whatever form under the laws of the government of the Canal Zone, are here-

by appropriated until and including June thirtieth, ninteen hundred and nine, as follows: The revenues derived from the postal service to the maintenance of that service; the remaining revenues, after setting aside a miscellaneous and contingent fund of ten thousand dollars, to the maintenance of the public school system in the Zone; to the construction and maintenance of public improvements within the Zone; to the maintenance of the administrative districts, including payment of salaries and wages incident thereto; to the maintenance of Canal Zone charity patients in the hospitals of the Isthmian Canal Commission, and to the maintenance of administrative district prisoners. A detailed and classified statement of all receipts and expenditures without the duplication of items under this paragraph shall be submitted to Congress after the close of the fiscal year ninteen hundred and nine.

Act of August 24, 1912, c. 390, 37 Stat. 560:

SEC. 2. That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide. The existing courts established in the Canal Zone by Executive order are recognized and confirmed to continue in operation until the courts provided for in this Act shall be established. 48 U. S. Code 1309.

* * * * *

SEC. 4. That when in the judgment of the President the construction of the Panama

Canal shall be sufficiently advanced toward completion to render the further services of the Isthmian Canal Commission unnecessary the President is authorized by Executive order to discontinue the Isthmian Canal Commission, which, together with the present organization, shall then cease to exist; and the President is authorized thereafter to complete, govern, and operate the Panama Canal and govern the Canal Zone, or cause them to be completed, governed, and operated, through a governor of the Panama Canal and such other persons as he may deem competent to discharge the various duties connected with the completion, care, maintenance, sanitation, operation, government, and protection of the canal and Canal Zone. If any of the persons appointed or employed as aforesaid shall be persons in the military or naval service of the United States, the amount of the official salary paid to any such person shall be deducted from the amount of salary or compensation provided by or which shall be fixed under the terms of this Act. The governor of the Panama Canal shall be appointed by the President, by and with the advice and consent of the Senate, commissioned for a term of four years, and until his successor shall be appointed and qualified. He shall receive a salary of ten thousand dollars a year. All other persons necessary for the completion, care, management, maintenance, sanitation, government, operation, and protection of the Panama Canal and Canal Zone shall be appointed by the President, or by his authority, removable at his pleasure, and the compensation of such persons shall be fixed by the President, or

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by his authority, until such time as Congress may by law regulate the same, but salaries or compensation fixed hereunder by the President shall in no instance exceed by more than twenty-five per centum the salary or compensation paid for the same or similar services to persons employed by the Government in continental United States. * * * 48 U. S. Code 1305.

* * * * *

SEC. 7. That the governor of the Panama Canal shall, in connection with the operation of such canal, have official control and jurisdiction over the Canal Zone and shall perform all duties in connection with the civil government of the Canal Zone, which is to be held, treated, and governed as an adjunct of such Panama Canal. Unless in this Act otherwise provided all existing laws of the Canal Zone referring to the civil governor or the civil administration of the Canal Zone shall be applicable to the governor of the Panama Canal, who shall perform all such executive and administrative duties required by existing law. * * * 48 U. S. Code 1307.

Act of August 21, 1916, c. 371, 39 Stat. 527, 528 (48 U. S. C., Secs. 1324, 1325):

SEC. 6. That deposit money orders issued in the Canal Zone in lieu of postal savings certificates in accordance with the rules and regulations heretofore established by the President, or that may hereafter be established by him, shall bear interest at a rate not exceeding two per centum per annum.[1]

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[1] Three per centum by amendatory Act of September 21, 1922, c. 370, sec. 11, 42 Stat. 1008, 48 U. S. C., Sec. 1324.

SEC. 7. That the interest received from the Canal Zone money-order funds deposited in banks under Canal Zone regulations shall be available to pay the interest on deposit money orders authorized by the preceding section. Such interest shall also be available to pay any losses which are chargeable to the Canal Zone postal service.

Act of February 16, 1933, c. 89, 47 Stat. 812 (48 U. S. C., Sec. 1323a):

SEC. 1. The postal service of the Canal Zone shall be governed by such of the laws, rules, and regulations of the Postal Service of the United States as are not inapplicable to the conditions existing in the Canal Zone, and the Governor of the Panama Canal is authorized to establish new post offices or discontinue those already established, to provide such rules and regulations as are necessary for the operation of the service, to appoint the personnel thereof, and to prescribe the postage stamps and other stamped paper which shall be used in such service: *Provided, however,* That the expenses of operating the Canal Zone postal service shall be defrayed, so far as possible, from the revenue derived therefrom, the use of which for that purpose is hereby authorized.

3. INLAND WATERWAYS CORPORATION

Act of June 3, 1924, c. 243, 43 Stat. 360, 361, 362, 363 (49 U. S. C., Sec. 151 ff.)

* * * * *

Sec. 2. The capital stock of the corporation shall be $5,000,000, all of which is hereby subscribed for by the United States. Such subscription shall be paid by the Secretary

of the Treasury, within the appropriations therefor, upon call from time to time by the Secretary of War. Upon any such payment a receipt therefor shall be issued by the corporation to the United States and delivered to the Secretary of the Treasury, and shall be evidence of the stock ownership of the United States. There is hereby authorized to be appropriated the sum of $5,000,000 for the purpose of paying such subscription.

Sec. 3. (a) Until otherwise directed by Congress, the corporation shall continue the operation of the transportation and terminal facilities now being operated by or under the direction of the Secretary of War, under section 201 of the Transportation Act, 1920, as amended, and shall, as soon as there is an improved channel sufficient to permit the same, initiate the water carriage heretofore authorized by law upon the Mississippi River above Saint Louis.

(b) If the Secretary of War deems it advisable to discontinue the operation of any part of the transportation or terminal facilities, or to develop and operate new lines, in order to give the public the proper service, he shall report thereon to Congress. The operation of any of such facilities shall not be discontinued and new lines shall not be developed or operated until authorized by Congress.

(c) The operation of the transportation and terminal facilities under this Act shall be subject to the provisions of the Interstate Commerce Act, as amended, and to the provisions of the Shipping Act, 1916, as amended, in the same manner and to the same extent as if such facilities were pri-

vately owned and operated; and all vessels of the corporation operated and employed solely as merchant vessels shall be subject to all other laws, regulations, and liabilities governing merchant vessels.

SEC. 4 (a) The Secretary of War shall appoint an Advisory Board of six members (hereinafter referred to as the "board") from individuals prominently identified with commercial or business interests in territory adjacent to the operations of the corporation. No member of the board shall be an officer, director, or employee of, or substantially interested in, any railroad corporation. Two of such members shall continue in office for terms of one year, and the remaining four for terms of two, three, four, and five years, respectively, from the date of appointment, the term of each to be designated by the Secretary of War. Each successor shall be appointed by the Secretary of War for a term of five years from the date of the expiration of the term of the member whom he succeeds, except that any successor appointed to fill a vacancy occurring prior to the expiration of a term shall be appointed only for the unexpired term of the member whom he succeeds. A vacancy in the board shall not impair the powers of the remaining members to execute the functions of the board.

(b) The members shall receive no salary for their services on the board but, under regulations and in amounts prescribed by the Secretary of War, may be paid by the corporation a reasonable per diem compensation for attending meetings of the board and for time spent on special service of the corporation, and their traveling expenses to

and from such meetings, or when assigned to such special service.

* * * * *

(d) The board shall meet for organization purposes when and where called by the Secretary of War, and thereafter at such times and places as the Secretary deems necessary. The board shall consider matters submitted to it by the Secretary of War, and make recommendations thereon, and from time to time advise him and make recomendations, in respect of the management and operation of existing facilities, or the development and operation of new lines.

SEC. 5. The corporation—

(a) Shall have succession in its corporate name during its existence;

(b) May sue and be sued in its corporate name;

(c) May adopt a corporate seal, which shall be judicially noticed, and may alter it at pleasure;

(d) May make contracts;

(e) May acquire, hold, and dispose of property;

(f) May appoint, fix the compensation of, and remove such officers, employees, attorneys, and agents as are necessary for the transaction of the business of the corporation; define their duties, and require bonds of them, and fix the penalties thereof;

(g) May incur obligations, borrow money for temporary purposes, and issue notes or other evidences of indebtedness therefor, but the aggregate amount of the indebtedness at any time shall not exceed 25 per centum of the value of the assets at such time;

(h) May exercise any of the functions vested in the Secretary of War by sections

201 and 500 of the Transportation Act, 1920, as amended;

(i) May, in the exercise of such functions, conduct the business of a common carrier by water, and maintain, manage, and operate properties held for or used in the service of transportation, or necessary or convenient to such use; and

(j) In addition to the powers specifically granted, shall have such powers as may be necessary or incidental to fulfill the purposes of its creation.

SEC. 6. (a) The Secretary of War shall transfer to the corporation all assets transferred to, or acquired, constructed, or operated by, or under the direction of, the Secretary of War, or which revert to the United States, under section 201 of the Transportation Act, 1920, as amended, or under the joint resolution entitled "Joint resolution to exempt the New York State Barge Canal from the provisions of section 201 of the Transportation Act, 1920, and for other purposes," approved February 27, 1921.

(b) The rights, privileges, and powers, and the duties and liabilities, of the Secretary of War, or the inland and coastwise waterways service, in respect of any contract, loan, lease, account, or other obligation, under section 201 of such Act, or under such joint resolution, shall become the rights, privileges and powers, and the duties and liabilities, respectively, of the corporation.

(c) All money available for expenditure or the making of loans under such joint resolution or section 201 of such Act, and all money repaid in pursuance of loans made under subdivision (c) of section 201 of such

Act, shall be available for expenditure or the making of loans by the corporation under this Act.

(d) The enforcible claims of or against the Secretary of War, or the inland and coastwise waterways service, in respect of the operation, construction, or acquisition of any such transportation facilities, shall become the claims of or against, and may be enforced by or against, the corporation.

(e) The Secretary of War shall adjust and appraise the value, at the time of transfer, of all assets transferred to the corporation under this Act, and such value shall be entered upon the books of the corporation.

(f) In the determination of the running of the statute of limitations or of any prescriptive right, the period of time shall be computed in the same manner as though this Act had not been passed.

Shipping Act of 1916, c. 451, 39 Stat. 728, 731:

SEC. 11. That the board, if in its judgment such action is necessary to carry out the purposes of this Act, may form under the laws of the District of Columbia one or more corporations for the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States. The total capital stock thereof shall not exceed $50,000,000. The board may, for and on behalf of the United States, subscribe to, purchase, and vote not less than a majority of the capital stock of any such corporation, and do all other things in regard thereto necessary to protect the interests of the United States and to carry out the purposes of this Act. The board, with the approval of the President, may sell any or all of the stock of the

United States in such corporation, but at no time shall it be a minority stockholder therein: *Provided,* That no corporation in which the United States is a stockholder, formed under the authority of this section, shall engage in the operation of any vessel constructed, purchased, leased, chartered, or transferred under the authority of this Act unless the board shall be unable, after a bona fide effort, to contract with any person a citizen of the United States for the purchase, lease, or charter of such vessel under such terms and conditions as may be prescribed by the board.

* * * * *

Merchant Marine Act of 1920, c. 250, 41 Stat. 988, 990:

SEC. 4. That all vessels and other property or interests of whatsoever kind, including vessels or property in course of construction or contracted for, acquired by the President through any agencies whatsoever in pursuance of authority conferred by the Acts or parts of Acts repealed by section 2 of this Act, or in pursuance of the joint resolution entitled "Joint resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes," approved May 12, 1917, with the exception of vessels and property the use of which is in the opinion of the President required by any other branch of the Government service

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of the United States, are hereby transferred to the board: *Provided,* That all vessels in the military and naval service of the United States, including the vessels assigned to river and harbor work, inland waterways, or vessels for such needs in the course of construction or under contract by the War Department, shall be exempt from the provisions of this Act.

PART B.—ORDERS AND REGULATIONS

1. Act No. 8, Enacted September 2, 1904

* * * * *

By authority of the President of the United States, be it enacted by the Isthmian Canal Commission:

* * * * *

Sec. 9. There is hereby created and established the office of Treasurer of the Canal Zone. * * *

He shall receive, safely keep, and duly account for all moneys belonging to the Government of the Canal Zone, from whatever source derived. He shall take proper receipts for all moneys paid or disbursed and give proper receipts for all moneys received by him by virtue of his office.

* * * * *

Sec. 42. By Executive Order dated June 24, 1904, provision was made as follows:

> That a post office be established in each of the following-named towns of the Canal Zone, to-wit: Cristobal, Gatun, Bohio, Gorgona, Bas Obispo, Empire, Culebra, La Boca, and Ancon. The post offices at Cristobal and Ancon shall be money-order offices.

The post office at Bas Obispo is discontinued, and post offices are hereby established at San Pablo and Matachin.

There is hereby created and established a postal service for the Canal Zone, Isthmus of Panama.

It shall be the duty of the Postal Service to administer the affairs of the post offices and the postal affairs of the Zone.

The Postal Service of the Canal Zone shall be conducted, regulated and controlled by such of the laws, rules, and regulations of the postal service of the United States as are not inapplicable to the conditions of law and fact existing in the Canal Zone, and the laws enacted and the rules and regulations adopted by the Isthmian Canal Commission.

* * * * *

SEC. 44. All moneys collected or received by the Director of Posts by virtue of his office shall be deposited forthwith with the Treasurer of the Canal Zone, and a receipt in duplicate therefor issued by the Treasurer to the Director of Posts, who shall attach the original thereof to his monthly account. [Laws of the Canal Zone, Isthmus of Panama, 1906, p. 52 *et seq.*]

2. ORDER OF THE SECRETARY OF WAR, PROMULGATED NOVEMBER 5, 1905

* * * * *

Now, therefore, by the authority of the President of the United States, and with the concurrence and approval of the Secretary of War first had, be it ordered by the Isthmian Canal Commission that:

SECTION 1. The following rules and regulations shall apply to the accounting system of the Govern-

ment of the Canal Zone, and shall take effect and be in force July 1, 1905.

* * * * *

MONEY ORDER ACCOUNTS

RULE 21. The Auditor shall keep the accounts of the Money Order Business separately, and in such manner as to show the number and amount of money orders issued at each post office, and the number and amount paid, and the fees received. The Auditor shall certify quarterly the receipts as fees from the sale of money orders and require the same to be deposited with the Treasurer of the Zone as postal receipts. Losses of money order funds in transit, by fire, burglary, or other unavoidable casualty for which credit may be given shall be deducted from the fees collected before the quarterly transfer to the depositary of such fees as postal receipts.

RULE 22. Transfers of money from postal receipts to money order funds may be made by the postmaster, under such regulations as the Auditor may prescribe when his receipts from the sale of money orders are insufficient to pay the money orders drawn upon his office. Credit for such transfers of postal funds to money order funds will be taken in the monthly postal account of the postmaster. At the close of each quarter all such transfers of funds from postal to money order accounts shall be deposited by the Director of Posts, or other officer in charge of postal affairs, with the Treasurer of the Zone, as revenues for the service of the Division of Posts upon certification of the Auditor of the amount of such funds to be so deposited.

RULE 22½. The Treasurer of the Canal Zone shall be required to keep an account of money order

funds deposited by postmasters with him to the credit of the Director of Posts, subject to his official draft, when countersigned by the Local Auditor, drawn for needful advances to postmasters of funds with which to pay money orders lawfully drawn upon them, and it shall be the duty of all postmasters to make prompt remittances to the Treasurer of the Zone of all money order funds including all fees thereon, in their hands, not needed to meet drafts of which they have notice, the same to be deposited to the credit of the Director of Posts as money order funds.

* * * * *

WM. H. TAFT, *Secretary of War.*

NOVEMBER 5, 1905.

3. MINUTES OF MEETING OF ISTHMIAN CANAL COMMISSION, MAY 2, 1906

The Chairman also stated that steps were being taken to establish a money-order system on the Isthmus, explaining that such a system would not only serve as a convenience to the employees, but would enable the Commission to avail itself of the money received, following each pay period, reducing to that extent the necessary shipment of funds required monthly by the Disbursing Officer.

Pursuant to the authorization of the Secretary of War * * * it was—

Resolved, That * * * the action of the Governor of the Canal Zone, after conference with the Chairman and approved by the Chairman while on the Isthmus, for the immediate installation of a postal money-order system in the Canal Zone postoffices, be approved.

4. Executive Order No. 1409, Promulgated September 8, 1911

Establishing the postal-savings system in the Canal Zone

By virtue of the authority vested in me, I hereby establish the following Order for the Canal Zone:

Section 1. There is hereby established in the post-offices of the Canal Zone a postal-savings system, to be operated without the payment of interest on the deposits under such rules and regulations as may be now or hereafter adopted.

Sec. 2. There is hereby created a Board of Trustees for the control, supervision, and administration of the postal savings depository offices designated and established under the provisions of this Order, and of the funds received as deposits at such postal savings depository offices by virtue thereof. Said board shall consist of the Collector of Revenues of the Canal Zone, the Auditor of the Canal Zone Government, and the Treasurer of the Canal Zone, severally, acting *exofficio,* and shall have power to make all necessary and proper regulations for the receipt, transmittal, custody, deposit, investment, and repayment of the funds deposited at postal savings depository offices; the regulations above mentioned to be subject to the approval of the Chairman of the Isthmian Canal Commission.

* * * * *

Section 5. At least one dollar, or a larger amount in multiples thereof, must be deposited before an account is opened with a person depositing the same; and one dollar, or multiples thereof, may be deposited after such account has been opened. Postal savings deposits will be evidenced by postal

savings certificates issued in fixed denominations of $1, $2, $5, $10, $20, $50, $100, each bearing the name of the depositor, the number of his account, the date of issue, and the name of the depository office.

SECTION 7. Postal-savings funds received under the provisions of this Order shall be deposited with the Treasurer of the Canal Zone under such regulations as the Board of Trustees may prescribe.

* * * * *

SECTION 9. That the final judgment, order, or decree of any court of competent jurisdiction adjudicating any right or interest in the credit of any sum deposited by any person with the postal-savings depository, if the same shall not have been appealed from, and the time for appeal have expired, upon submission to the Collector of Revenues of a copy of the same, duly authenticated in the manner provided by the laws of the United States for the authentication of the records and judicial proceedings of the courts of any state or territory, or of any possession subject to the jurisdiction of the United States, when the same are proved or admitted within any other court within the United States, shall be accepted by the Board of Trustees as conclusive of the title, right, interest, or possession so adjudicated; and any payment of said sum in accordance with such order, judgment, or decree shall operate as a full and complete discharge of the United States and the Canal Zone Government from the claim or demand of any person or persons to the same.

* * * * *

WM. H. TAFT.

THE WHITE HOUSE,
September 8, 1911.

5. Executive Order to Establish a Permanent Organization for the Panama Canal (Published in the 660 Series of Governor's Circulars in re General and Separate Organizations)

By virtue of the authority vested in me, I hereby enact the following order, creating a permanent organization for the Panama Canal, under the Act of Congress "To provide for the opening, maintenance, protection, and operation of the Panama Canal, and the sanitation and government of the Canal Zone," approved August 24, 1912 [Sec. 4, Panama Canal Act].

Section 1. The organization for the completion, maintenance, operation, government and sanitation of the Panama Canal and its adjuncts and the government of the Canal Zone shall consist of the following departments, offices and agencies, and such others as may be established by the Governor of the Panama Canal on the Isthmus or elsewhere with the approval of the President, all to be under the direction of the Governor, subject to the supervision of the Secretary of War.

* * * * *

ACCOUNTING DEPARTMENT

There shall be an Accounting Department under the supervision and direction of the Auditor, with an assistant in the United States [Sec. V, Executive Order of Mar. 2, 1914, p. 162, defines duties of Assistant Auditor in the United States]. The duties of the department shall include all general bookkeeping, auditing and accounting, both for

money and property, costkeeping, the examination of payrolls and vouchers, the inspection of time books and of money and property accounts, the preparation of statistical data, and the administrative examination of such accounts as are required to be submitted to the United States Treasury Department; and the collection, custody and disbursement of funds for the Panama Canal and the Canal Zone. These same duties shall be performed for the Panama Railroad Company on the Isthmus when not inconsistent with the charter and by-laws of that Company. The department shall be charged with the handling of claims for compensation on account of personal injuries and of claims for damages to vessels. Within the limits fixed by law, the duties and financial responsibilities of the officers and employees charged with the receipt, custody, disbursement, auditing and accounting for funds and property shall be prescribed in regulations issued by the Governor, with the approval of the President. The Auditor shall maintain such a system of bookkeeping as will enable him to furnish at any time full, complete and correct information in regard to the status of appropriations made by Congress, the status of all other funds, and the amounts of net profits on all operations, which are to be covered into the Treasury as required by the Panama Canal Act.

* * * * *

SEC. 3. This order shall take effect from and after the 1st day of April, 1914, from which date the Isthmian Canal Commission, together with the present organization for the Panama Canal and

the Canal Zone, shall cease to exist, in acordance with the terms of the above-mentioned Act of Congress.

WOODROW WILSON.

THE WHITE HOUSE,
January 27, 1914.

6. BY VIRTUE OF THE AUTHORITY VESTED IN ME, I HEREBY ESTABLISH THE FOLLOWING ORDER FOR THE CANAL ZONE

SECTION 1. The Executive Order of September 8, 1911, establishing the Postal Savings System in the Canal Zone, is hereby repealed, PROVIDED THAT accounts, opened in accordance with that order, and the regulations established thereunder, shall continue as prescribed in said order and regulations until they are finally closed by the withdrawal of the deposits.

SECTION 2. For the accommodation of persons desiring to deposit their savings in the post offices of the Canal Zone, money orders may be issued in the Canal Zone payable to the purchaser at the office of issue, for which no fee shall be charged.

SECTION 3. This order shall take effect from and after October 1, 1914.

WOODROW WILSON.

THE WHITE HOUSE,
5 September 1914.

THE PANAMA CANAL

OFFICE OF THE GOVERNOR,
Culebra, C. Z., April 1, 1914.

Circular No. 660–2.

ACCOUNTING DEPARTMENT

AUDITOR OF THE PANAMA CANAL

1. The Auditor of The Panama Canal is charged with the immediate direction and control of accounting, and the auditing and settlement of claims for The Panama Canal and Canal Zone and for the Commissary Department of The Panama Railroad on the Isthmus. He has supervision and control over the acceptance of bonds, the methods of keeping records and accounts of receipts and disbursements of moneys received by all officers and agents of The Panama Canal and Canal Zone by virtue of their offices or positions, and the methods of safeguarding such moneys. He shall prescribe all forms for recording the receipt and disbursement of moneys and property and all forms necessary for use in accounting for money and property, except as otherwise prescribed in accordance with law. He is authorized, and it shall be his duty, to examine the books, contracts, records, and accounts of money and property in the possession of all officers and agents of The Panama Canal and Canal Zone, and of the Commissary Department of the Panama Railroad on the Isthmus. He shall perform all the duties heretofore assigned to the Examiner of Accounts or to the Auditor of the Canal Zone Government, and the additional duties prescribed by the Executive Order of January 27, 1914.

DISBURSEMENTS—PAYMASTER

2. The Paymaster is charged with the payment on the Isthmus of all moneys appropriated for The Panama Canal and expendable under the direction of the Governor. The Paymaster will make payments only on vouchers or pay rolls, time vouchers or pay receipts which have been examined and audited by the Auditor. All collections made by the Paymaster on the pay rolls shall be paid by him to the Collector upon the certificate of the Auditor specifying the amount and the source from which derived, except refundments of overpayments and amounts due The Panama Railroad Company for supplies or services rendered employees, and except other deductions authorized to be made and to be paid to other branches of the service, to contractors or other persons. All other duties performed by the Disbursing Officer of the Isthmian Canal Commission prior to April 1, 1914, will be performed by the Collector.

RECEIPTS—COLLECTOR

3. The Collector shall perform all duties heretofore performed by the Treasurer of the Canal Zone and, in addition, shall collect or receive all amounts due The Panama Canal and Canal Zone. He shall transfer all cash received by him and not required for the performance of his duties, to the Paymaster. For the funds of The Panama Canal, he shall take the Paymaster's receipts; for Canal Zone, money order, postal savings bank, clubhouse, and other trust funds and security deposits, he shall take the draft of the Paymaster on the Treasurer

of the United States and shall deposit same in depositories under the contracts entered into by the Secretary of War. He shall have such number of deputies or assistants as may be assigned to him. All moneys, records, and papers of the Treasurer of the Canal Zone, and all moneys, records, and papers of the Collector of Revenues and his deputies, insofar as they relate to the collection of moneys, shall be transferred to the Collector of The Panama Canal.

4. The Collector will render an account for all public moneys of the United States received by him to the Auditor for the War Department, through the Auditor of The Panama Canal. The account will be forwarded to the Auditor of The Panama Canal within ten days after the close of each month, and will be forwarded by the Auditor of The Panama Canal to the Auditor for the War Department within ten days thereafter.

5. All amounts due The Panama Canal or Canal Zone will be collected by the Collector or his deputies whenever practicable. Bonded employees of the various departments and divisions designated by the Auditor may make collections for minor services or sales. In the performance of their duties in connection with receiving, handling, and refunding cash, such employees shall be subject to the direction of the Auditor. Such bonded employees shall issue receipts in triplicate, giving the original to the party making deposit and sending the duplicate to the Auditor.

* * * * *

PART C.—DECISIONS AND OPINIONS

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, June 16, 1931.

A–7515.
A–12887.

UNITED STATES SHIPPING BOARD:

GENTLEMEN: It has been the practice of the Merchant Fleet Corporation to maintain accounts in certain banks in the United States designated by the Corporation for the deposit of moneys derived from operation of vessels by the Managing Operators, good faith deposits, receipts from sales and miscellaneous collections.

The vessels and other property in custody of the Board constitute property of the United States, controlled through its agent, the Merchant Fleet Corporation, and moneys derived from the business operations of the Fleet Corporation are moneys of and for the use of the United States. Receipts of the Government go into the General Fund of the Treasury and are available for the general purposes of Government unless the Congress directs that they be set apart for a specific use in a special fund. The fact that the Congress has included the moneys received from operations and sale of property in the appropriation "United States Shipping Board" does not affect or alter their character but, on the contrary, establishes the fact that such amounts constitute moneys of the United States. Furthermore no provision was made in the Shipping Act of 1916 or Merchant Marine Acts of 1920 and 1928 which would authorize the deposit of Government moneys except as provided by law. Section 3617, Revised Statutes.

It is proposed, therefore, that all domestic collections, other than special deposits, for each fiscal year be deposited into the Treasury to the credit of specified receipt accounts, which may be designated "United States Shipping Board Operating Receipts" and "United States Shipping Board Sales Receipts." Operating receipts so covered in would be placed to the credit of the appropriation "O–551 United States Shipping Board Fund." Sales receipts so covered-in would be placed to the credit of two funds—"Liquidation Fund" from which expenses of liquidation may be paid within limitations of the appropriation act and "08557 Construction Loan Fund, United States Shipping Board." Special deposit collections would be deposited in the disbursings officer's official checking account with the Treasury. All disbursements would be made by disbursing officer's checks drawn on the Treasurer of the United States against advances made them on accountable warrant.

It is requested that the matter be given consideration and this office advised as to the views of the Board.

Respectfully,

(Signed) J. R. McCarl,
Comptroller General of the United States.

Comptroller General
of the United States,
Washington, February 8, 1932.

United States Shipping Board.

Sirs: There has been received your letter of August 19, 1931, in reply to office letter dated June

16, 1931, relative to the practice of depositing public moneys in banks by the Merchant Fleet Corporation.

Since receipt of your letter copies of resolutions adopted by the Board on November 4 and 11 and December 9, 1931, have been received. Resolution adopted November 4, 1931, provides:

> WHEREAS, monies of the United States have been deposited in divers banking institutions by the Merchant Fleet Corporation; and
>
> WHEREAS, it is provided under Title 12, Section 90, of the Compiled Statutes, that the Secretary of the Treasury shall require all national banking institutions who are acting as financial agents of the Government to give satisfactory security by the deposit of United States Bonds and otherwise for the safekeeping and prompt payment of the public money deposited with them; and
>
> WHEREAS, it is the desire of the United States Shipping Board to follow the plan thus outlined by Act of Congress;
>
> RESOLVED, that all banks and banking institutions which have or shall have monies of the United States in the name of the United States Shipping Board Merchant Fleet Corporation be and they are hereby required as a condition of the said deposit to give satisfactory security to said Merchant Fleet Corporation by the deposit of United States Bonds and otherwise for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as depositaries of such monies.
>
> FURTHER RESOLVED, that the Treasurer of the United States Shipping

> Board Merchant Fleet Corporation be and he is hereby authorized and required to address to each one of the said banks and banking institutions now having such monies on deposit, a letter in the form hereto attached enclosing a form of deposit agreement, and as a condition for the continuance of said deposit the said Treasurer of the said Merchant Fleet Corporation is authorized and directed to require the signing of an agreement in the form attached hereto, and the deposit by such depositary of United States Bonds in adequate amounts as collateral for the repayment of the amount of each deposit in each bank and banking institution, respectively.

It thus appears to be admitted by resolution of the Board that all moneys deposited in banks in the name of the United States Shipping Board Merchant Fleet Corporation are moneys of the United States, which is in accord with letter of June 16, 1931, A–7515.

Section 14 of the Merchant Marine Act, 1920, 41 Stat. 988, provides:

> That the net proceeds derived by the board prior to July 1, 1921, from any activities authorized by this Act, or by the "Shipping Act, 1916," or by the Acts specified in section 2 of this Act, except such an amount as the board shall deem necessary to withhold as operating capital, for the purposes of section 12 hereof, and for the insurance fund authorized in section 10 hereof, and for the construction loan fund authorized in section 11 hereof, shall be covered into the Treasury of the United States to the credit of the board and may be expended by it, within the limits of the amounts heretofore or hereafter authorized, for the con-

> struction, requisitioning, or purchasing of vessels. After July 1, 1921, such net proceeds, less such an amount as may be authorized annually by Congress to be withheld as operating capital, and less such sums as may be needed for such insurance and construction loan funds, shall be covered into the Treasury of the United States as miscellaneous receipts. The board shall, as rapidly as it deems advisable, withdraw investment of Government funds made during the emergency under the authority conferred by the Acts or parts of Acts repealed by section 2 of this Act and cover the net proceeds thereof into the Treasury of the United States as miscellaneous receipts.

The provision as to receipts subsequent to July 1, 1921, "less such amount as may be authorized annually by Congress to be withheld as operating capital," is not considered as granting authority to deposit such moneys in banks, but merely for the withholding of certain funds from deposit into the Treasury of the United States as "miscellaneous receipts."

The following provisions of law are pertinent in connection with the points raised in your letter:

> The gross amount of all moneys received from whatever source to the use of the United States, except as otherwise provided, shall be paid by the officer or agent receiving the same into the Treasury, at as early a day as practicable, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever. But nothing herein shall affect any provision relating to the revenues of the Post Office Department" (Section 3617, Revised Statutes).

The Secretary of the Treasury may designate such depositaries of public moneys in foreign countries and in the territories and insular possessions of the United States as may be necessary for the transaction of the Government's business, under such terms and conditions as to security and otherwise as he may from time to time prescribe: Provided, That in designating such depositaries American financial institutions shall be given preference wherever, in the judgment of the Secretary of the Treasury, such institution is safe and able to render the service required" (42 Stat. 692).

All collectors and receivers of public money of every description, within the District of Columbia, shall, as often as they may be directed by the Secretary of the Treasury or the Postmaster General so to do, pay over to the Treasurer of the United States, at the Treasury, all public moneys collected by them or in their hands * * *. It shall be the duty of the Secretary and Postmaster General, respectively, to direct such payments by the collectors and receivers * * * at least as often as once in each week, and as much oftener as they may think proper (Section 3615, Revised Statutes).

Every person who shall have moneys of the United States in his hands or possession, and disbursing officers having moneys in their possession not required for current expenditure, shall pay the same to the Treasurer, or some public depositary of the United States, without delay, and in all cases within thirty days of their receipt. And the Treasurer or the public depositary shall issue duplicate receipts for the moneys so paid, transmitting forthwith the original to the Secretary of the Treasury, and delivering

the duplicate to the depositor: Provided, That postal revenues and debts due to the Post Office Department shall be paid into the Treasury in the manner required by law. (Section 3621, Revised Statutes; 29 Stat. 179; 41 Stat. 654–655.)

Title 12, section 90, of the Compiled Statutes, referred to in the resolution, *supra,* has reference to the powers of the Secretary of the Treasury in the designation of national banking institutions as public depositaries, and does not confer on any other branch or establishment of the Government any powers as to designation and amount or class of security to be required of depositaries.

The court decisions cited in your letter, *Sloan Shipyards* v. *U. S. S. B. E. F. C.,* 258 U. S. 549, *Skinner & Eddy* v. *McCarl,* 275 U. S. 1, and *U. S. S. B. M. F. C.* v. *Leroy Harwood, Trustee,* 281 U. S. 519, hold in substance that the Merchant Fleet Corporation is a separate entity, bound by and subject to suit in connection with its corporate acts.

The provisions contained in the current and certain prior appropriation acts covering the availability of interest earned on funds of the Merchant Fleet Corporation and its accrual to these funds is not construed as authorizing such funds to be kept in the possession of the corporation and invested or deposited in banks not officially designated depositaries of the United States, in violation of the specific acts above quoted. Such provisions appropriate the interest which has accrued on bank deposits already made under the irregular practice, for the purposes mentioned in said appropriation acts, and may not be said to sanction or authorize the continuance of such practice.

The resolution adopted by the Board on December 9, 1931, approves a certain deposit agreement between the Merchant Fleet Corporation and the Commercial National Bank, Washington, D. C., accepting as security for the deposit balance notes secured by deeds of trust on real property in the District of Columbia. Inasmuch as it is admitted that the funds in the hands of the Merchant Fleet Corporation are public moneys, it is held that the general statutes applicable to the safeguarding of such public moneys are applicable in the absence of specific legislation to the contrary. Expenses of the Fleet Corporation are now being paid by Treasury checks in Washington, and there appears no necessity for maintenance of the account with the Commercial National Bank.

Whether or not compliance with statutory law will increase or diminish the burdens of a department or establishment of the Government is a matter for submission to the Congress for its consideration.

It is therefore requested that the matter be given further consideration and this office advised as to the action taken.

Respectfully,

(Signed) J. R. McCarl,
Comptroller General of the United States.

PART D.—REPORTS

Annual Report of the Isthmian Canal Commission for 1913, p. 415:

> The major portion of the funds of the Canal Zone have been continued on deposit with the two depositories at Washington,

D. C., although an amount not exceeding $100,000 is deposited in one of the banks on the Isthmus. The actual amount in all depositories on June 30, 1913, was $2,168,339.62, secured by the deposit of high-grade bonds under control of a representative of the Government.

Annual Report of the Isthmian Canal Commission and the Panama Canal for 1914, p. 328:

> The major portion of the funds of the Canal Zone have continued on deposit with the two depositories in Washington, although an amount not exceeding $100,000 is deposited in one of the banks on the Isthmus. The amount on deposit in all depositories June 30, 1914, was $1,594,285.53, against $2,168,339.62 on June 30, 1913. These funds are secured by the deposit of high grade bonds under the control of a representative of the Government.

Annual Report of the Governor of the Panama Canal for 1915, pp. 278, 279:

> The depositaries of Canal Zone funds, including in that term money order, postal savings, and clubhouse funds, have been continued three in number, the District National Bank and the Commercial National Bank, of Washington, D. C., and the Panama Branch of the International Banking Corporation. On June 30, 1913, the amount on deposit was $2,168,339.62; on June 30, 1914, $1,594,285.53; and on June 30, 1915, $770,965.18. There is also a small amount still remaining in the Riggs National Bank of Washington, necessarily left there on account of outstanding checks chargeable against the deposit. These funds are all secured by the deposit of high-grade bonds

under the control of a representative of the Government. Interest on deposits during the year amounted to $48,798.35, as against $61,354.12 received during 1914.

Report of the Governor of the Panama Canal for 1916, pp. 485, 486:

Attention is invited to the statement of postal receipts and expenditures which is appended to this report. It will be noted that the receipts for 1916 were $1,060.90 more than in the previous year. The expenses were $9,739.19 less. The deficit was $44,527.14, as compared with $55,327.23 in 1915. In any consideration of the postal deficit it should be remembered that the postal service is still burdened with a subsidy to the Panama Government equivalent to 40 percent of its total stamp sales—in 1916, $27,207.86—and that the service is allowed no credit in the accounts for the interest earned by money-order and postal-savings funds on deposit with banks, amounting in 1916, according to an estimate furnished by the auditor, to about $39,000. If the subsidy were withdrawn and the credit were allowed for interest earned by these funds, the account would show a surplus of approximately $20,000.

* * * * *

As previously stated in this report, a large part of the deficit of the Canal Zone postal system would be wiped out if the postal division were allowed interest received from Canal Zone money-order funds deposited in banks under Canal Zone regulations. In the past these earnings have been deposited with the United States Treasurer. If this interest were credited to the postal division, it would also permit the payment of interest

upon deposit money orders. The following sections were therefore made a part of a bill which passed the House of Representatives on June 17, 1916 (H. R. 15955):

* * * * *

It is hoped that this legislation will be enacted.

PART E.—HOUSE REPORT NO. 1083, 67TH CONG., 2D SESS., PP. 15–17

AMENDMENT TO SECTION 6 OF THE ACT OF AUGUST 21, 1916

Early in January, 1921, hearings were held by the committee on a bill then pending to amend section 6 of the act entitled "An act extending certain privileges of canal employees to other officials on the Canal Zone and authorizing the President to make rules and regulations affecting health, sanitation, quarantine, taxation, public roads, self-propelled vehicles, and police powers on the Canal Zone, and for other purposes," including provision as to certain fees, money orders, and interest deposits, approved August 21, 1916, and on January 10 Col. Chester Harding, then Governor of the Panama Canal, testified at the hearings. Governor Harding strongly recommended this legislation. At the hearings he filed and made a part of his testimony the following letter from the then Secretary of War, which states some of the most forceful arguments in favor of this legislation:

WAR DEPARTMENT,
Washington, September 12, 1919.

THE SPEAKER OF THE HOUSE OF REPRESENTATIVES.

SIR: I have the honor to state that a communication has been received from Col. Chester Harding, governor of the Panama Canal, from which the following is quoted:

The rate of interest which can be paid on deposit money orders in the Canal Zone postal service is limited by the act of Congress approved August 21, 1916, section 6 of which act reads as follows:

"Deposit money orders issued in the Canal Zone in lieu of postal savings certificates, in accordance with the rules and regulations heretofore established by the President, or that may hereafter be established by him, shall bear interest at a rate not exceeding 2 per centum per annum."

Since the establishment of the deposit money-order system in the Canal Zone deposits have been made to the amount of $4,793,125 during the fiscal years ending 1916, 1917, 1918, and to date in 1919. The employees of the Panama Canal during the same period have bought $4,716,100 worth of Liberty loan bonds and war savings stamps. The residents of the Canal Zone have learned to save and have acquired the saving habit to a high degree during the foregoing period, and I believe that inducement and opportunity should be offered them to continue saving.

The Treasury Department has refused to continue the sale of war savings stamps in the Canal Zone, and it is not likely that there will be further Government loans; therefore it appears that the deposit money-order system of savings will have to be substituted for the foregoing method. In order to make this more attractive, it is considered that the rate of interest should be increased. * * *

Gov. Harding then recommends that the rate of interest paid on deposit money orders in the Canal Zone postal service be increased from 2 per cent to 3 per cent, and I concur in this recommendation.

In order to accomplish the foregoing, it is requested that section 6 of the act of Congress approved August 21, 1916, be amended by the substitution of the word "three" per cent in place of the word "two" per cent, which section would then read as follows:

> SEC. 6. That deposit money orders issued in the Canal Zone in lieu of postal savings certificates, in accordance with the rules and regulations heretofore established by the President, or that may hereafter be established by him, shall bear interest at a rate not exceeding three per cent per annum.

It should be stated that the postal money-order funds of the Canal Zone are deposited in banks in the United States, upon which interest is paid, and which funds are secured by the deposit of certain standard bonds. The interest thus received will more than pay the proposed rate of 3 per cent on deposit money orders, and therefore there will be no loss to the United States Government if the rate is increased as requested, this being due to the fact that under the regulations which have been established no interest is paid on deposit money orders unless the money remains on deposit for more than three months, and then only in three-month periods.

It is believed that the rate of interest in the Canal Zone should be increased in order to encourage thrift among the employees of the Panama Canal, a large percentage of whom are aliens. The principal banks in Panama pay 4 per cent on savings or time accounts, the rate generally allowed on checking accounts being only 2 per cent, and the loan rates on the Isthmus are generally 9 per cent.

The canal employees as a rule prefer to place their savings with the United States Government rather than in private banks, and therefore use the post offices as depositaries. Considerable adverse comment has been made by them in regard to the low rate of 2 per cent interest allowed on deposit money orders under the present law, in view of the much higher rates allowed by the banks in Panama. Under the circumstances it is believed that the canal employees should be encouraged in every possible way to save and to deposit their savings with the Government, and it is thought that the increasing of the rate of interest on deposit money orders from 2 to 3 per cent will be of great assistance toward accomplishing this end.

Very respectfully,

NEWTON D. BAKER,
Secretary of War.

It is the view of the committee that thrift and savings ought to be encouraged as much as possible among the employees on the Canal Zone. There are, of course, no banks on the Canal Zone. It has been thought undesirable for the employees to be forced to deposit their savings in banks in the Republic of Panama, where there have been several serious bank failures. It is not always convenient for the employees to send their savings back to the States for deposit in the banks there. The act of August 21, 1916, provided for the issue of deposit money orders in lieu of postal savings certificates by the post offices in the different towns there, to bear 2 per cent interest. The funds received on

deposit from these sources are deposited by the canal government in banks in the States, and the government receives from 3 to 3½ per cent interest thereon. It is thought that the rate of interest paid by the government to the employees on their savings deposits ought to be increased to 3 per cent, and that is the purpose of this bill.

WAR DEPARTMENT,
Washington, January 17, 1922.

Hon. SAMUEL E. WINSLOW,
Chairman Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D. C.

MY DEAR CONGRESSMAN: Referring to your letter of January 13, 1922, addressed to the Washington office of the Panama Canal, asking for a report on bill H. R. 9051 amending section 6 of the act approved August 21, 1916, I inclose herewith a copy of House Document No. 248, Sixty-sixth Congress, first session, which contains a letter dated September 12, 1919, from the Secretary of War to the Speaker of the House of Representatives, requesting that the act of August 21, 1916, be amended to permit the payment of 3 per cent instead of 2 per cent interest on deposit money orders in the Canal Zone, which letter was referred to your committee. A bill (H. R. 14739) was subsequently introduced by Mr. Esch, on December 8, 1920, to amend the act as requested, and on January 10, 1921, Gen. Chester Harding, then Governor of the Panama Canal, appeared before your committee in regard to the bill. Gen. Harding's

testimony will be found on pages 10 to 13 of the inclosed copy of hearings before your committee. The bill was favorably reported on January 11, 1921, but no further action was taken thereon by the Sixty-sixth Congress.

The present bill (H. R. 9051) is identical with the previous bill (H. R. 14739), with the exception that the word "taxes" in the fourth line of the title and the sixth line of the bill proper should be "taxation," and the word "process" in the sixth line of the title and the eighth line of the bill proper should be "provision."

I am advised that there has been no change in the situation and that the Panama Canal authorities still desire that this legislation be enacted, and I therefore recommend that your committee submit a favorable report on the bill, and that everything possible be done to secure its early passage in the House of Representatives.

Sincerely yours,

JOHN W. WEEKS,
Secretary of War.

PART F.—CORRESPONDENCE

WHITE HOUSE,
Washington, D. C., May 9, 1904.

SIR:

* * * * *

Inasmuch as it is impracticable for the President, with his other public duties, to give to the work of supervising the Commission's construction of the Canal and government of the zone the personal attention which seems proper and necessary, and inasmuch as the War Department is the de-

partment which has always supervised the construction of the great civil works for improving the rivers and harbors of the country and the extended military works of public defense, and as the said department has from time to time been charged with the supervision of the government of all the island possessions of the United States, and continues to supervise the government of the Philippine Islands, I direct that all the work of the Commission done by virtue of powers vested in me by the act of Congress approved June 28, 1902, in the digging, construction, and completion of the Canal, and all the governmental power in and over said canal zone and its appurtenant territory, which by virtue of the act of Congress approved April 28, 1904, and these instructions, shall be vested in said Isthmian Canal Commission, shall be carried on or exercised under your supervision and direction as Secretary of War.

Subject to the limitations of law and the conditions herein contained, the Isthmian Canal Commission are authorized and directed:

1. To make all needful rules and regulations for the government of the zone and for the correct administration of the military, civil, and judicial affairs of its possessions until the close of the Fifty-eighth Congress.

2. To establish a civil service for the government of the strip and construction of the Canal, appointments to which shall be secured as nearly as practicable by a merit system.

* * * * *

6. To make all needful rules and regulations respecting an economical and correct disbursement

and an accounting for all funds that may be appropriated by Congress for the construction of the canal, its auxiliary works, and the government of the canal zone; and also to establish a proper and comprehensive system of bookkeeping, showing the state of the work, the expenditures by classes, and the amounts still available.

* * * * *

The commission may legislate on all rightful subjects of legislation not inconsistent with the laws and treaties of the United States so far as they apply to said zone and other places, and the said power shall include the enactment of the sanitary ordinances of a preventive or curative character to be enforced in the cities of Colon and Panama and which are contemplated and authorized by Article 7 of said Canal Convention. Such legislative power shall also include the power to raise and appropriate revenues in said zone; and all taxes, judicial fines, customs duties, and other revenues levied and collected in said zone by or under the authority of said commission shall be retained, accounted for, and disbursed by said commission for its proper purposes. The members of said commission to the number of four or more shall constitute a legislative quorum, and all rules and regulations passed and enacted by said commission shall have set forth as a caption that they are enacted by the Isthmian Canal Commission "By authority of the President of the United States."

* * * * *

All laws, rules, and regulations of a governmental character enacted by the commission hereunder shall be submitted to you for your approval,

and should your approval be withheld from any such law, rule, or regulation, then from that time the law, rule, or regulation shall thereafter have no force or effect.

* * * * *

The necessary expenses incurred by the commission in carrying on the government of the canal zone will be defrayed from the local revenues so far as the said revenues may be sufficient and the remainder will be met from the appropriation made by the fifth section of the act of Congress approved June 28, 1902. An estimate of the proposed expenditures and revenues for each year in carrying on the government of the zone will be submitted to Congress at the beginning of each annual session.

* * * * *

These instructions may be modified and supplemented as occasion shall arise.

Very respectfully,

THEODORE ROOSEVELT.

Hon. WILLIAM H. TAFT,
Secretary of War.

ISTHMIAN CANAL COMMISSION,
DEPARTMENT OF
EXAMINATION OF ACCOUNTS,
Empire, Canal Zone, September 19, 1908.

Lieut. Col. GEO. W. GOETHALS,
Chairman and Chief Engineer, Culebra, C. Z.

SIR: The appointment of a Treasurer of the Canal Zone and his entrance upon duty October 1, 1908, brings up the question of the safekeeping of

the money of the Canal Zone Government now amounting to more than one million dollars. Since the beginning of the work in 1904 the Disbursing Officer of the Commission has acted as Treasurer of the Canal Zone and for some time past has kept the moneys of the United States and of the Canal Zone in one fund. In order to avoid keeping a total of more than two million dollars in cash in the office building at Empire, the present Disbursing Officer has used the Canal Zone moneys, as occasion required, in payment of the obligations of the Commission. At the present time he has not a sufficient amount of cash on hand to pay over the money due the Canal Zone and at the same time meet the Commission's obligations. He has, however, a large balance to his credit as Disbursing Officer, with the Assistant Treasurer of the United States at New York. From this balance he can have shipped a sufficient amount of cash to pay over to the new Treasurer of the Canal Zone, the entire amount due, if it is found desirable to do so.

It being important that the moneys of the Canal Zone should be kept separate, such moneys now received by the Treasurer exceeding five million dollars a year, you determined that a Treasurer should be appointed. Mr. Homer A. A. Smith has executed the required bond and will enter upon the duties of the office October 1, 1908.

More than ninety percent of the moneys received by the Canal Zone Government are money-order funds. At this time money-order sales are made at the rate of five million dollars a year. Many employees on the Isthmus purchase money orders payable to themselves at the place of issue and hold

them for many months; others purchase them payable to themselves at post offices in the United States. Under its arrangement with the United States Post Office Department the Canal Zone Government pays at the time of issue ninety percent of the face value of orders drawn on the United States. Thus ten percent of the amount of these orders is held until they have been paid by the United States Postal Service. This fund with the balance of the ninety percent always on hand pending the arrival of the time for regular remittance, constitutes a large fund. There is also a fund of about four hundred thousand dollars which represents the value of money orders issued in the Zone and payable in the Zone. This may be said to be the savings of employees who deposit them for safe-keeping.

The experience of the past year has shown that there is not less than seven hundred thousand dollars that is in the nature of a permanent fund, which will remain in the Treasury of the Canal Zone Government, in cash and will not be touched. I think it undesirable to keep this amount in the office building at Empire, if other arrangements can be made. In my opinion it is desirable that the Treasurer have a depository on the Isthmus for the purpose of issuing checks in payment of accounts when it is found best to pay particular classes of accounts by check.

As the moneys of the Zone are not moneys of the United States, the laws regarding the designation of depositories of public moneys do not apply. The International Banking Corporation is not incorporated under the national banking law of the

nited States, but it has been used as a fiscal gency in connection with the financial transactions f the War Department in the Insular possessions f the United States. This corporation has anches in the Canal Zone, and for that reason I ave the honor to suggest that the Honorable Sec- tary of War be requested to authorize the making f an agreement with the International Banking orporation for the deposit with it of approxi- ately seven hundred thousand dollars. I would so suggest, for your consideration, that as the Var Department has had dealings with this bank nd the main office of the bank is in New York City, may be best that the negotiations be had between he War Department and the bank, rather than etween the Commission on the Isthmus and the ank.

Without knowing anything of the attitude of he bank on the subject I beg to suggest the fol- wing brief outline of what I think is desirable om the standpoint of the Canal Zone:

1. The Canal Zone will place on deposit with the ank at New York, or with its branches on the sthmus for the credit of the New York bank, as he bank may prefer, six hundred thousand dollars more, subject to the check of the Treasurer of he Canal Zone. To this account the Treasurer ould deposit checks on New York received by him om the Disbursing Officer of the Isthmian Canal ommission in exchange for cash and other checks nd drafts payable in the United States. The Dis- ursing Officer pays out about one and one-half illion dollars monthly in salaries and wages, and considerable amount comes back to the Treasurer

of the Canal Zone through the post offices. The Treasurer would draw on this account in New York as a rule only to make payments to the Postal Service of the United States. So far as can be foreseen, the balance of this account would for several years never be less than six hundred thousand dollars.

2. The bank should pay interest, at a rate agreed upon, on the average daily balance on deposit in New York, and, if desired by the bank, it would be practicable to give notice of say thirty days, if it be found necessary at some future time to so draw on the account as to reduce the balance below six hundred thousand dollars. The bank should render a monthly statement of deposits and payments, and credits to the Treasurer on Interest Account.

3. The Canal Zone will place on deposit with the bank on the Isthmus one hundred thousand dollars or more, subject to the check of the Treasurer of the Canal Zone, and checks to be payable at any of the branches of the bank on the Isthmus. It is intended that this fund on deposit shall include all moneys not deposited in or to the credit of the bank in New York and not needed by the Treasurer for current cash payments. This fund on deposit on the Isthmus should not bear interest but will not be less than one hundred thousand dollars at any time and would approximate two hundred thousand dollars at the present time.

4. The agreement should be for one year and be renewed from year to year with the option on the part of either the bank or Secretary of War to terminate the agreement on three months' notice; the agreement to be immediately terminated should

Congress, by law, direct its termination, or give directions concerning Canal Zone funds inconsistent with it.

5. The bank should furnish security to the satisfaction of the Secretary of War, either in the form of a deposit of bonds or other marketable securities payable to the Treasurer of the Canal Zone, or by the guaranty of three or more surety companies to the satisfaction of the Secretary of War.

Respectfully,

W. W. WARWICK,
Examiner of Accounts.

ISTHMIAN CANAL COMMISSION,
PURCHASING DEPARTMENT,
Washington, D. C., October 21st, 1908.

Honorable LUKE E. WRIGHT,
Secretary of War, Washington, D. C.

SIR: I have the honor to forward herewith a letter from Mr. W. W. Warwick, the Examiner of Accounts, relative to the deposit of Canal Zone funds, which have been separated from the monies covered by Congressional appropriations, and are now in the custody of the Treasury of the Canal Zone.

As noted in Mr. Warwick's letter, the monies of the Zone are not monies of the United States, so that the laws regarding the designation of depositories of public monies do not apply. It is advisable, however, that the funds should not remain in the hands of the Treasurer and also desirable that so much of the monies as are not in constant use should, if possible, draw interest. It would

be a matter of great convenience if the company to be made depository have a branch on the Isthmus, thereby eliminating all questions of exchange.

There are on the Isthmus four banks; a branch of the International Banking Company; Isaac Brandon and Brothers, Merchants and Bankers; Ehrman Brothers; and the Panama Banking Company. I forward herewith propositions for the care of these funds from both the International Banking Company and Isaac Brandon and Brothers. It is to be noted that the latter firm is just reorganizing, while the former is a long and well-established banking house. The Examiner of Accounts recommends that the International Banking Company be selected as the depository for the Canal Zone funds and if not inconsistent with public policies, I have the honor to recommend favorable consideration, the arrangements to be entered into with the International Banking Company being similar to those now existing between the War Department and this Company covering the deposit of Philippine funds.

Respectfuly,

GEO. W. GOETHALS,
Chairman and Chief Engineer.

Enclosures 3.

ISTHMIAN CANAL COMMISSION,
PURCHASING DEPARTMENT,
Washington, D. C., October 24, 1908.

The Honorable, LUKE E. WRIGHT,
Secretary of War, Washington, D. C.

SIR: I have the honor to forward herewith a letter from the International Banking Corporation,

dated October 23d, withdrawing their letter of the 17th instant relative to Canal Zone funds.

This leaves for consideration Isaac Brandon and Brothers, Bankers, and the Commercial National Bank of Washington, D. C., the President of which offered to pay 3½% interest on any amounts left for one year in their charge, and in view of the fact that the former is not yet organized and that the security proposed is not as good as that offered by the Commercial National Bank, I recommend that the Commercial National Bank of Washington, D. C., be made the depository for the Canal Zone funds that can be deposited in the United States and that similar arrangements be made with this Company relative to security as now exist between the Insular Bureau and the International Banking Corporation for the funds of the Philippine Islands.

If this meets with your approval, I would recommend that Captain F. C. Boggs, General Purchasing Officer, represent the Canal Zone Government in all matters relating to these funds.

Respectfully,

GEO. W. GOETHALS,
Chairman and Chief Engineer.

[1st Indorsement]

WAR DEPARTMENT,
October 24, 1908.

Approved as recommended by the Chairman and Chief Engineer.

LUKE E. WRIGHT,
Secretary of War.

APRIL 20, 1910.

Mr. CHAS. D. NORTON,
Assistant Secretary of the Treasury,
Washington, D. C.

SIR: Referring to our conversation this afternoon, and at your request, I respectfully submit the following questions in regard to the deposit of Canal Zone funds.

As a preliminary, it might be stated that the total funds amount to approximately $1,500,000.00, of which $1,250,000.00 is approximately permanent, the average fluctuating amount being about $250,000.00.

1. What bonds would you consider as satisfactory to secure this deposit?

2. Do you approve the bonds stated as being satisfactory under the Treasury Department Circular of December 24, 1908?

3. Do you consider White & Kemble's Digest as satisfactory to decide whether these bonds are approved legal securities in the States mentioned?

4. Do you think, in view of the fact that the contract provides for checking out at any time, that the total amount of the securities calculated on their market value should be the same as the amount deposited; or do you consider that the bonds should be accepted at only 90% of their market value?

5. Would you deem it satisfactory to accept indemnity bond for any portion of this deposit, keeping in mind that the deposit is public money?

6. If the deposit is thoroughly protected by satisfactory bonds, would you deem it advisable, as a

matter of safety, to divide the total fund of $1,500,000.00 between two or more banks?

7. Would you deem it advisable to place the bonds given as security for the deposit in the vault of the bank with whom the contract is made; or, would you consider it better to place them with a third party, the vault to be opened only in the presence of a representative of all three parties, except where, under the provisions of the contract, the Secretary of War directs that the bonds be withdrawn for sale?

8. Do you consider an immediate termination of the contract by either party as advisable; or do you think a certain length of time, such as ten days, should be given in order that the bank could secure the sum without injury to its other depositors?

Very respectfully,

(Signed) F. C. Boggs,
Captain, Corps of Engineers, U. S. A.,
Chief of Office.

Treasury Department,
Office of the Secretary,
Washington, April 21, 1910.

Captain F. C. Boggs,
Corps of Engineers, U. S. A.,
Isthmian Canal Commission,
Washington, D. C.

Sir: In reply to your letter of the 20th instant in the matter of security for Canal Zone funds on deposit with national bank depositaries I would say in answer to inquiries:

Nos. 1 and 2. The kinds of bonds named in the press announcement of the Secretary of the Treas-

ury dated December 18, 1909, copy enclosed, would be satisfactory security on the bases named in said announcement.

No. 3. White and Kemble's Digest is regarded as reliable.

No. 4. See answer to Nos. 1 and 2.

No. 5. An indemnity bond would not be satisfactory.

No. 6. It would be advisable to divide the deposits between two or more banks.

No. 7. The security should be kept in your own safe.

No. 8. This Department usually gives notice of two weeks or more of the withdrawal of deposits according to the amount withdrawn.

There appears to be no objection to the propositions contained in your letter of the 21st instant.

Respectfully,

C. D. HILLES, *Acting Secretary.*

WAR DEPARTMENT,
Washington, April 23, 1910.

The Honorable, the SECRETARY OF THE TREASURY,
Washington, D. C.

SIR: Referring to our recent conversation at Cabinet Meeting in connection with the Canal Zone funds:

Will you kindly advise me whether you would consider a deposit with either the Commercial National Bank, of Washington, D. C., or Riggs National Bank, at about two per cent., satisfactory, if the deposit were covered by bonds described in

paragraphs 2 and 3 of Treasury Department Circular dated December 24, 1908. Copy of this circular is enclosed herewith.

Very respectfully,

J. M. DICKINSON,
Secretary of War.

1 inclosure.

TREASURY DEPARTMENT,
Washington, April 25, 1910.

MY DEAR MR. SECRETARY: I am sorry I did not receive your letter of April 23 on Saturday in time to send you a reply as you requested. I was in Baltimore Saturday afternoon and did not return until late.

My judgment is that a deposit in the Commercial National Bank of Washington, or the Riggs National Bank, at about two percent would be safe and satisfactory if the deposit were covered by bonds described in Treasury Circular dated December 24, 1908.

Very sincerely yours,

FRANKLIN MACVEAGH.

Hon. J. M. DICKINSON,
Secretary of War.

THE SECRETARY OF THE TREASURY,
Washington, July 28, 1914.

DEAR MR. SECRETARY: Replying to your recent request, I take pleasure in handing you herewith a letter from the Comptroller of the Currency, in which he recommends the three following institu-

tions, or either one or more of them, as suitable depositaries for Panama Canal funds:

Commercial National Bank;
District National Bank;
Continental Trust Company,

all of this city. As the Commercial National Bank is already one of your depositaries, you may find it convenient to extend your balance with that bank, and to open additional accounts with the District National Bank and the Continental Trust Company. Upon notice from you, each one of these banks will comply with the regulations of the War Department as to deposit of securities, etc.

Will you kindly advise me when you have taken action in this matter?

Very sincerely yours,

W. G. McADOO.

Hon. L. M. GARRISON,
Secretary of War.

Enclosure.

U. S. GOVERNMENT PRINTING OFFICE: 1938

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM

No. [redacted] 5

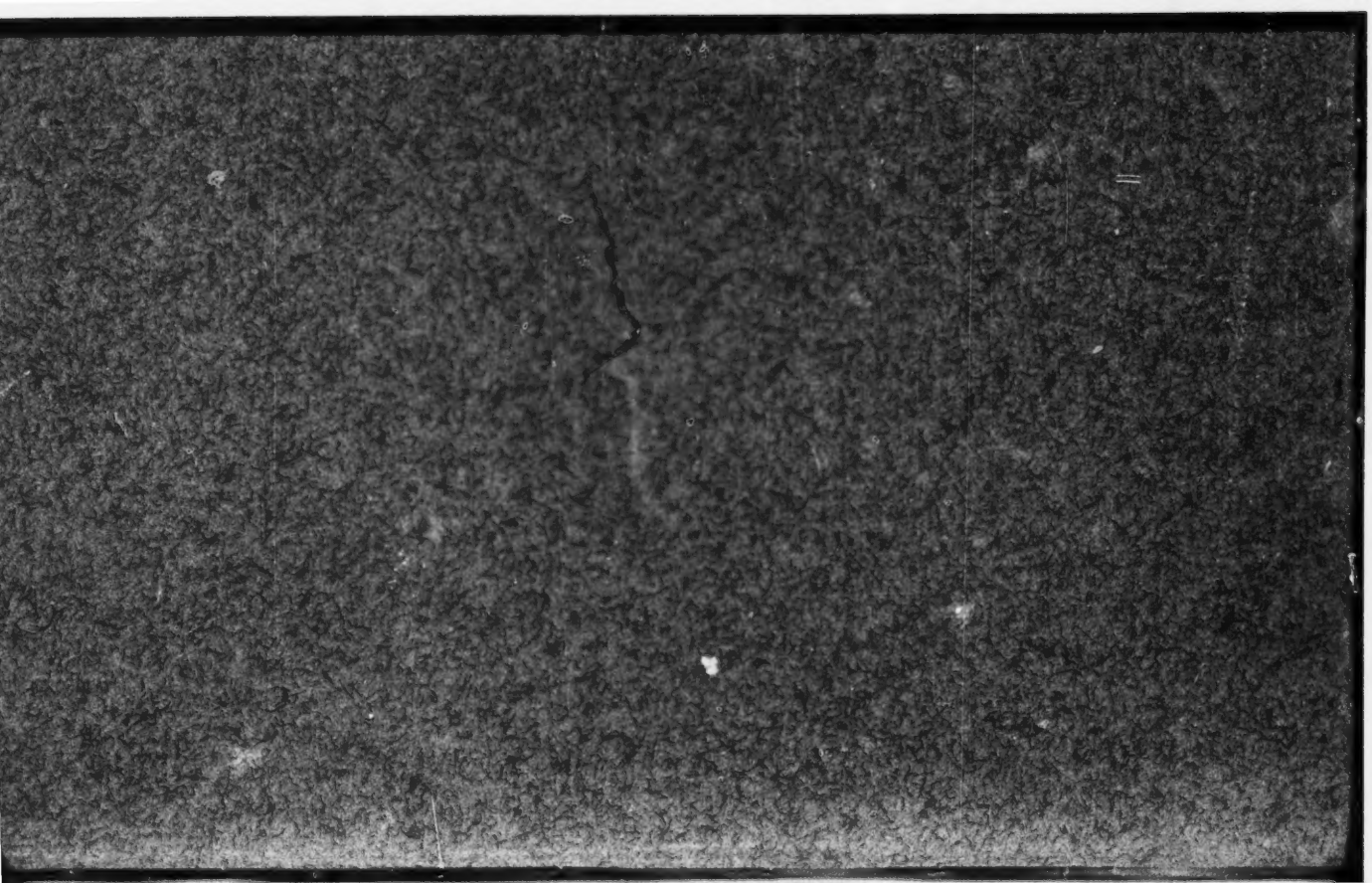
HENRY H. WOODRING, SECRETARY OF WAR, AND E. A. S. SMITH, GENERAL, PURCHASING OFFICER AND CHIEF OF WASHINGTON OFFICE, PANAMA CANAL, *Petitioners*,

v.

JOSEPH S. WARDELL, RECEIVER, DISTRICT NATIONAL BANK OF WASHINGTON, D. C., *Respondent*.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROSCOE CLAGETT,
CHARLES E. WARNEKROS,
Attorneys for Joseph S. Wardell, Respondent.



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IN THE

Supreme Court of the United States

OCTOBER TERM.

No. 628.

HARRY H. WOODRING, SECRETARY OF WAR, AND H. A. A. SMITH, GENERAL PURCHASING OFFICER AND CHIEF OF WASHINGTON OFFICE, PANAMA CANAL, *Petitioners,*

v.

JUSTUS S. WARDELL, RECEIVER, DISTRICT NATIONAL BANK OF WASHINGTON, D. C., *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW AND JURISDICTION OF THE COURT.

The judgment of the District Court was entered without an opinion (R. 23). The opinion of the United States Court of Appeals for the District of Columbia (R. 26) is reported in 100 Fed. (2d) 690, which opinion adopts the opinion in the case of *Inland Waterways Corporation, et al.*, v. *Hardee*, 100 Fed. (2d) 678. The reference to the statute under which the jurisdiction of this Court is invoked (pet. p. 3) is correct.

QUESTIONS PRESENTED.

As a preliminary to stating the issues of law presented by the petition, petitioner makes a summary of the case which is the starting point for certain erroneous conclusions reached later in the petition. The District National Bank of Washington, D. C., the Receiver of which is respondent here, prior to its insolvency in 1933, received as deposits not merely "funds of the Canal Zone, principally derived from its Postal Service" (pet. p. 2), but specifically deposits "almost entirely composed of moneys received by the Postal Service of the Canal Zone," which "consisted of deposit money order funds and money order funds." (R. 14) The distinction will be shown later to be important. Such funds were deposited by the Secretary of War in the District National Bank under an agreement by which specified bonds belonging to the bank were deposited with an agent of the Secretary of War to secure the deposit. After the insolvency of the bank and the appointment of a Receiver, the bonds securing the deposits were sold and the proceeds of such sale of bonds were paid to the Secretary of War by the setting up of a deposit account in the Hamilton National Bank of Washington, D. C., in the name of "Secretary of War Canal Zone funds." (R. 2, 3, 13.) Admittedly, the funds deposited in the District National Bank before closing, that is the so-called Panama Canal funds, were not public money of the United States and were not part of the revenue of the United States and were not subject to the control of the Secretary of the Treasury in his official capacity as such Secretary in respect to public money of the United States. (R. 20) The Receiver, respondent here, assailed the validity of the agreement to give security as being *ultra vires* of the bank and void and the payment of the deposit in full as being illegal and in violation of the National Bank Act, as constituting a preference over other depositors and brought this suit to recover the proceeds of the security to the extent that such proceeds exceeded

the dividends paid to general depositors. (50 per cent at the time of bringing suit) (R. 4); more now.

STATEMENT.

The "statement" in the petition (pp. 3, 4, 5), so far as it goes, sets forth correctly the facts in connection with the making of the deposits, the pledge of the assets of the bank to secure the deposits, subsequent sale of the pledged assets, the bringing of the suit in the District Court, and the decree there entered in favor of respondent, and its affirmation by the United States Court of Appeals for the District of Columbia.

In addition to the facts stated by petitioner, additional facts are shown by the record which have a bearing upon the granting or denial of the petition, namely:

1. The complaint averred (R. 3) and the answer specifically admitted (R. 13) that the proceeds of the pledged securities were, after the closing of the bank, paid to the Secretary of War by the setting up of a deposit account in the Hamilton National Bank of Washington, D. C., in the name of "Secretary of War Canal Zone funds."

2. The complaint averred (R. 6) and the court below held (100 Fed. (2d) 678, 689, 690), and the petition admits, that the proceeds of the sale of the pledged securities have not been covered into the Treasury of the United States or the Treasury of any State, Territory or other government, and the proceeds of the pledge sought to be recovered do not belong to the United States, nor is there any law under which they could be covered into the Treasury of the United States (100 Fed. (2d) 689).

Additional facts shown by the record will be mentioned in the course of the argument.

REASONS FOR DENYING CERTIORARI.

The petition raises no novel question nor is it shown that the decision of the court below is in conflict with any decision of this Court, or of any United States Circuit Court of Appeals.

The arguments advanced as reasons for granting certiorari represent merely an effort to reverse principles of law definitely settled by the decisions of this Court in *Texas and Pacific Ry.* v. *Pottorff,* 291 U. S. 245; *Marion* v. *Sneeden,* 291 U. S. 262; *Lewis* v. *Fidelity and Deposit Co. of Maryland,* 292 U. S. 559, and in a long list of cases in the various Circuit Courts of Appeal in which this Court has so consistently denied certiorari that it apparently considers the questions settled. None of the questions raised by petitioners can be considered as novel, nor have the petitioners pointed to any conflict in the decision of the court below in the instant case with any of the decisions of this Court, or with the decisions of the various Circuits. Hence, under the rules and decisions of this Court governing the granting of certiorari, no compelling reasons are advanced in the petition for granting the writ.

While petitioner urges a number of specifications of error, only the following were stressed in the petition:

1. (p. 7) "In holding the suit not one against the United States, and in failing to regard the United States as an indispensable party, the court below failed properly to apply the decisions of this Court."

2. a (p. 14) "In holding invalid the securing of the Canal Zone's deposit, the court below decided in a way contrary to the long settled administrative practice an important question of banking law affecting many agencies, which ought to be decided by this Court."

2. b (p. 16) "In addition the court below erred in failing to find a specific authority in the Secretary of War to enter into a contract requiring the District National Bank to se-

cure deposits of Panama Canal money, particularly as applied to the deposits in this case, which were almost entirely composed of money order funds and deposit money order funds received in the Canal Zone Postal Service."

(In a footnote to the petition (p. 3), it is stated that if certiorari is granted, it is proposed to consider also the question whether, if the deposit was invalid under R. S. Sec. 5497, the bank became a trustee *ex maleficio* of the funds here involved. No facts are stated either in the complaint or answer which furnish a basis for consideration of such question, the assignment of errors on appeal raised no such question, it was not argued orally or on briefs below, and neither the trial court nor the court below considered such question.)

Inasmuch as the court below first discussed the questions raised in points 2. a and 2. b, just mentioned, having to do with the illegality of the pledges and the effect of the decision in *O'Connor* v. *Rhodes,* 79 Fed. (2) 146, such points will be discussed first here, followed by a discussion of point 1 as to the United States being an indispensable party.

The pledges involved were absolutely void and any effort to make them effective constitutes an illegal preference over other depositors of the bank.

All arguments in this case come back to the fundamental principles established and reiterated by this Court that the power to pledge assets is not necessary to deposit banking, that to permit such pledges is inconsistent with many provisions of the National Bank Act which are designed to insure in case of disaster uniformity in the treatment of depositors and a ratable distribution of assets, that even the United States Government is not entitled to a preference in the event of the insolvency of a national bank (*Cook County National Bank* v. *U. S.,* 107 U. S. 445) and that no deposits in national banks, public or private, may be legally secured unless Congress, which incorporated na-

tional banks, has specifically authorized the securing of specific public funds.

Prior to 1934, when this Court decided *Texas and Pacific Ry.* v. *Pottorff*, 291 U. S. 245, and *Marion* v. *Sneeden*, 291 U. S. 262, a contrary view prevailed generally and most of the argument contained in the present petition reflect that prior view, but this Court in the *Pottorff* case decided that:

> "National banks lack power to pledge their assets to secure a private deposit. The measure of their powers is the statutory grant; and powers not conferred by Congress are denied."

On the same day in *Marion* v. *Sneeden*, this Court decided similarly that national banks lack power to pledge their assets to secure any public deposits except those specifically authorized by Congress, saying:

> "For the reasons stated in Texas and Pacific Railway Co. v. Pottorff, decided this day, *ante*, p. 245, we are of opinion that the Act of 1864, did not confer the power to pledge assets to secure any public deposits except those made under Section 45 by the Secretary of the Treasury of the United States."

The Court then emphasized the specific nature of its decision by holding:

> "The power conferred by each later act except that of 1930 was limited to securing specific Federal funds."

The petition characterizes the above language of this Court as dictum but, we respectfully submit, the language quoted was necessary to a determination of what public deposits could be secured legally and, further, the effect of the language has not been departed from since either in this court or in any Circuit Court of Appeals although numerous cases involving the point have been decided below and certiorari sought here.

For example in *Lewis* v. *Fidelity and Deposit Co.*, 292 U. S. 559, this Court said (p. 564):

> "In *Texas and Pacific Railway Co.* v. *Pottorff*, 291 U. S. 245, and *Marion* v. *Sneeden*, 291 U. S. 262, decided after the entry of the judgment below, we held that a national bank had, prior to the Act of June 25, 1930, no power to make any pledge to secure deposits except the federal deposits specifically provided for by Acts of Congress."

The same rule has been followed by the court below both in the instant case and in *O'Connor* v. *Rhodes*, 79 Fed. (2d) 146, certiorari denied, except as to one minor point, in 296 U. S. 568. The same rule has been followed by all of the Circuit Courts of Appeal in which the question has been presented and certiorari has been consistently denied by this Court.

Leonard v. *Gage*, 94 Fed. (2d) 19, cert. den. 82 L. Ed. Ad. Op. 641.
Hood v. *Hardesty*, 94 Fed. (2d) 26, cert. den. 82 L. Ed. Ad. Op. 748.
City of Ft. Worth v. *McCamey*, 93 Fed. (2d) 964, cert. den. 82 L. Ed. Ad. Op. 1038.
City of Chicago v. *Joseph*, 95 Fed. (2d) 444, cert. den. 82 L. Ed. Ad. Op. 1043.
Granzow v. *Village of Lyons*, 89 Fed. (2d) 83.
Redfield-Independent School District v. *Schnetzer*, 94 Fed. (2d) 257.
LaParr v. *City of Rockford*, (C. C. A.) —— Fed. (2d) ——.
Griffin v. *Royall*, 70 Fed. (2d) 103.

Neither custom nor long settled administrative practice can give validity to the pledges.

The petition urges in point 2 a (p. 4) that the decision of the court below holding invalid the securing of the funds here involved was contrary to a long settled administrative practice and involved an important question of banking law affecting many agencies, which ought to be decided by this Court.

The advancement of this argument overlooks the underlying basis of the decisions of this Court in the *Pottorff* and *Sneeden* cases, namely, as stated in the *Pottorff* case, that:

> "It is the settled doctrine of this Court that no rights arise on an *ultra vires* contract, even though the contract has been performed; and that this conclusion cannot be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised. California Nat. Bank v. Kennedy, 167 U. S. 362; McCormick v. Market Nat. Bank, 165 U. S. 538; Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24."

In the last cited case, namely, the Pullman's Palace Car Co., this Court said (at p. 59):

> "A contract of a corporation, which is *ultra vires,* in the proper sense, that is to say, outside the object of its creation, as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

In addition, the precise point that custom and usage or long settled administrative practice justifies a reversal of the decision of the court below has been decided contrary to the contention of petitioner by this Court in the *City of Marion* v. *Sneeden, supra,* and in the following decisions of the various Circuit Courts of Appeal:

> *City of Fort Worth* v. *McCamey,* 93 Fed. (2d) 964.
> *Leonard* v. *Gage and Elliott,* 94 Fed. (2d) 19, cert. den. 82 L. Ed. Adv. Op. 641

Maxwell and Porter, et al. v. *Tarrant County Water Control and Improvement District,* Nos. 650 and 645 in Equity, the District Court of the United States for the Northern District of Texas, Fort Worth Division.

The pledges were not made in conformity with R. S. Sec. 5153, 12 U. S. C. Sec. 90 (Printed at p. 19 of the petition.)

Admittedly, the provisions of R. S., Sec. 5153 (12 U. S. C., Sec. 90) were not followed in making and securing the deposits here involved. Summarized, that section provides that for public money to be legally secured, the following requirements must be met: (a) The banks in which the deposits are made must be designated for that purpose by the Secretary of the Treasury; (b) the money deposited must be public money; (c) the deposit must be made by the direction of the Secretary of the Treasury; and (d) the pledge shall be required by the Secretary. The record is undisputed that the bank was not a depository designated by the Secretary of the Treasury, also that the deposits were not made by the Secretary of the Treasury, but by the Secretary of War; the record is also clear that the pledges were not exacted by the Secretary of the Treasury, nor were the pledge contracts made with him, and that the Secretary of the Treasury had no control whatever over the deposits or over the pledged securities. The record is also clear that the funds deposited were not public moneys (R. 20) and it is specifically admitted in the petition (p. 10) that "the fund represents money received by the Canal Zone Postal Service from private parties" and further the petition admits (p. 16) that the funds "were almost entirely composed of money order funds and deposit money order funds received by the Canal Zone Postal Service."

(The distinction between money order funds and regular postal funds and postal savings funds is pointed out below.)

The effect of R. S. Sec. 5153 (Sec. 90 Title 12 U. S. C.), is discussed in detail in *O'Connor* v. *Rhodes, supra,* beginning at page 149, and this Court denied certiorari in that case except as to one minor point, in 296 U. S. 568.

It is argued in the petition (p. 14) that it was the congressional intent to protect all deposits of public moneys, but the answer of petitioner specifically admits that the funds here involved were not public moneys (R. 20) and it was held in *Coudert* v. *U. S.*, 175 U. S. 178, that this section (R. S. Sec. 5153) has relation only to public money of the United States, public money being defined to be the revenues of the United States from all sources covered into the Treasury.

In addition, respondent suggests that the requirements of R. S. Sec. 5153 are not mere technical requirements since they are coupled (pet. p. 19) with additional requirements that the pledges required under such section by the Secretary of the Treasury are designed not only to make safe the deposits of public money, but also to insure the faithful performance of the duties of designated banks as financial agents of the government, and since they are also coupled with the requirement that the Secretary of the Treasury each year shall make a public statement of the securities required during that year for such deposits. None of such requirements were met in the instant case thus emphasizing that the deposits here in question were not secured under R. S. Sec. 5153.

When the admitted facts are analyzed in the light of the statute, it becomes apparent that the court below was correct in holding that these pledges could not be considered as being authorized under R. S. Sec. 5153.

There is no statutory authority for the pledging of assets to the Secretary of War or to any official with respect to the deposit of money order funds from the Canal Zone.

In addition to the contentions previously discussed, it is argued by petitioner that circulars, regulations and acts of the Canal Zone, coupled with acts of Congress relating to the Government of the Canal Zone, can be construed as authorizing the pledge of assets to secure such Canal Zone deposits. An examination of these various enactments show that they fall far short of the necessary statutory authorization required in view of the *Pottorff* and *Sneeden* decisions. The opinion of the court below contains a complete analysis of the various orders, regulations and statutes involved and holds that authority for the pledge can not be correctly read into these various enactments. The court below in harmony with the decision of this Court in *Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, found a complete absence of any Act of Congress specifically authorizing these pledges.

Petitioner refers (p. 17) to "'circular No. 660-2," issued from the Governor of the Canal Zone on April 1, 1914, which is not in the record and was not mentioned by the petitioner in his brief below, but which apparently is a circular of the accounting department of the Canal Zone. He contends that the provisions of this circular when considered with the Act of Congress of August 21, 1916, must be considered as specific authority for the pledge. The fallacy of this argument lies in the interpretation given to the circular itself and to the Congressional Act. The circular related to contracts that had been entered into by the Secretary of War under an assumption that national banks had power to secure deposits such as those relating to Canal Zone funds, and is no more than a direction to accounting officials to deposit in banks with which such contracts were had. This falls far short of a legal requirement for the taking of security. It simply recognizes an existing condi-

tion and does not bring into existence any requirement that deposits of Canal Zone funds must be secured. Nor does the 1916 Act of Congress undertake or require the giving of security in connection with such deposits. By its terms it relates to the disposition of interest paid on account of such deposits. Thus, the contention that the circular plus the Act of Congress, when read together, constituted a specific statutory requirement, is without foundation.

Examination of the executive orders of the President of the United States with respect to the Canal Zone, of the Treaties and Acts of Congress relating to the Panama Canal and of the laws of the Canal Zone shows that none of them contains any reference to the securing of deposits made by the Canal Zone or in its behalf in national banks in the United States or indeed in any banks. On June 19, 1934, there was approved by the Congress a "Canal Zone Act" (U. S. Govt. Printing Office: 1934), containing in codified form "all the laws relating to or applying in the Canal Zone, except such general laws of the United States as relate to or apply in the Canal Zone." The preface to this Canal Zone Code states that "the material included in the code has its source in acts of Congress, in certain acts and ordinances of the former Isthmian Canal Commission which were ratified and confirmed as valid and binding by Congress in the Panama Canal Act of 1912, and, in a limited number of sections, in Executive orders of the President which were likewise ratified and confirmed by Congress." The appendix also contains in addition "treaties and general laws of the United States applicable in or relating to the Canal Zone or the Panama Canal."

An examination of this Canal Zone Code shows that it contains no provision whatever requiring the securing of Canal Zone funds, money order or otherwise, deposited in national banks in the United States.

It is submitted that a mere "circular" apparently of the Governor of the Panama Canal Zone, not approved by the Secretary of War or the President of the United States, and not shown ever to have been reported to the Congress is not and cannot be such an authority, by implication, delegation or otherwise, as was contemplated by this Court in the *Pottorff, Sneeden* and *Rhodes* cases.

The various Acts of Congress, quoted in the petition and appendices thereto, relating to *Postal Savings Funds* are not applicable. While there at one time existed a *Postal Savings System* in the Canal Zone created September 8, 1911, by an executive order of President Taft such executive order made no provision for securing deposits of such postal savings funds and such system was abolished by an executive order of President Wilson dated Sept. 5, 1914 (Appendix A, hereto). The so-called "deposit money orders" issued under the executive order of President Wilson, the funds from which at closing constituted the deposits in question obviously could not have been covered by the circular of April 1, 1914, such circular having been issued before the system of deposit money orders was set up by President Wilson in September, 1914.

Since petitioner points to no authority, and there is none, authorizing a national bank to pledge its assets to secure deposits of Canal Zone Money Order Funds; and since petitioner points to no statute, and there is none, making it the duty of officers of the Canal Zone or the Secretary of War to exact security for safe keeping of Panama Money Order Funds deposited in national banks, the inescapable conclusion is that the pledging of assets by the District National Bank at the instance of the Secretary of War was *ultra*

vires, illegal and void *ab initio,* and that no rights flowed therefrom.

The United States is not an indispensable party.

As a reason for granting the writ petitioner urges that in holding the suit not to be one against the United States and in failing to regard the United States as an indispensable party, the Court below failed properly to apply the decisions of this Court.

Several fundamental misconceptions both of fact and of law render this reason for granting the writ invalid.

First, the argument proceeds throughout upon the explicit assumption that the faith of the United States is solemnly pledged to the repayment of the funds which were deposited in the District National Bank prior to closing and upon the further assumption that if this is correct, the United States Government is an indispensable party. Neither assumption is correct.

First, the references in the petition (footnote at p. 11) and the Act of Congress of February 16, 1934 (48 U. S. C. Sec. 1323 (a) quoted textually at pp. 20, 21 of the petition) deal exclusively with *postal savings funds,* whereas, as shown above, all the deposits here involved at closing were *money order funds* issued in the Panama Canal Zone regarding which there is no statutory pledge of repayment.

Second, and more important, even if the United States ultimately may have to make up any deficiency in Panama Canal Zone money order funds, such assumed fact would not make the United States an indispensable party. The same contention was made by the Solicitor General in *Sloan Shipyards Corp.* v. *United States Shipping Board Emergency Fleet Corporation,* 258 U. S. 549, urging that "its (the government's) property rights would be directly affected if the relief sought were granted," but this Court rejected such contention, and said (at p. 567):

"The sovereign, properly so called, is superior to suit for reasons that often have been explained. But the general rule is that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him. Supposing the powers of the Fleet Corporation to have been given to a single man, we doubt if anyone would contend that the acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the power of eminent domain to be called upon to defend himself in court. An instrumentality of government he might be, and for the greatest ends; but the agent, because he is agent, does not cease to be answerable for his acts. Osborn v. Bank of United States 9 Wheat. 738, 842, 843, 6 L. ed. 204, 229; United States v. Lee, 106 U. S. 196, 213, 221, 27 L. ed. 171, 179, 182, 1 Sup. Ct. Rep. 240. The opposite notion left some traces in the law (1 Rolle, Abr. 95, Action sur Case, T.), but, for the most part, long has disappeared."

The next error on this point in the petition is the assumption that by suing Harry H. Woodring, Secretary of War, respondent is in reality suing the United States. In paragraph 5 (b) of the complaint (R. 2) it is specifically averred that the defendants, and each of them, are sued both in their individual and in their official capacities.

The next basic and erroneous assumption in the petition is the statement upon which the whole structure of the indispensable party argument is based, namely, that "though an officer has custody of property the Courts cannot compel him to surrender it in a proceeding in which the United States is not a party, if the property is in the possession of the United States as owner (See, *Ex rel. Goldberg* v. *Daniels,* 231 U. S. 218) or if the interest of the United States will be affected (*Belnap* v. *Schield,* 161 U. S. 10, 18, and *International Postal Supply Co.* v. *Bruce,* 194 U. S. 601)."

The fundamental distinction overlooked is the distinction between the original deposits made by the Secretary

of War in the District National Bank and the money which the Secretary of War now has on deposit in the Hamilton National Bank which is sought to be recovered here. The money now on deposit in the Hamilton National Bank, which is the subject matter of this suit, admittedly represents the proceeds of respondent's bonds and, as has been shown above, the pledge being absolutely void, neither the United States nor anyone else became the owner or acquired any interest in the proceeds of such bonds.

United States ex rel. Goldberg v. *Daniels, supra,* was an action for mandamus to force the Secretary of the Navy to deliver to petitioner a United States cruiser, for which petitioner had bid at a sale, and obviously the United States Government was not only in possession but was the owner of such cruiser.

Belnap v. *Schield, supra,* was a suit for an injunction and for profits for the alleged infringement of a patent, the defendants being officers of the United States Navy. The suit was in effect one for damages against the United States. Even in such a case, however, the Court examined into the merits of the claim and found that the plaintiff had not suffered damages.

Similarly, *International Postal Supply Co.* v. *Bruce, supra,* was an action for an injunction against a United States Postmaster to restrain the use of certain stamp cancelling machines upon which the petitioner held a patent, and the Court based its opinion upon the decision in *Belnap* v. *Schield.* This Court in its opinion in *International Postal Supply Co.* v. *Bruce, supra,* clearly distinguished that case and *Belnap* v. *Schield,* from *United States* v. *Lee,* 106 U. S. 196, relied upon by respondent here, upon the ground that in the *Lee* case the United States did not own or have title to the property involved whereas in the *Belnap* case it did have such ownership and title. The distinction goes to the heart of the present case because here the ownership or title of the property involved was never in the United States, not only because ownership re-

mained always in respondent, but because the property involved was never covered into the Treasury of the United States and was never public money of the United States.

The petitioner seeks to draw a distinction based upon the fact that petitioner Woodring is not the person who originally obtained the property of respondent, but since admittedly petitioner's predecessor Dern, turned the property over to petitioner and petitioner holds the property in a bank account in the District of Columbia, the distinction fails.

The United States was not joined as a party defendant in the proceedings below for the reason that the respondent sued Harry H. Woodring and H. A. A. Smith, individually and officially, for the purpose of recovering the proceeds of the assets of the bank pledged to secure funds of the Panama Canal, and not for the purpose of recovering moneys of the United States in their possession or custody. The bill of complaint (R. 6, par. 9) averred that the funds claimed "are not moneys of the United States, are not part of revenues of the United States, are not subject to the control of the Secretary of the Treasury * * *".

Since the suit seeks recovery of specific private property (the proceeds received from the sale of the bank's assets) in the hands of the petitioner, the rule applies that where private money or property has been wrongfully taken or received, and where it is held by Government officials or agents, it may be recovered, and such a suit is not a suit against the United States and the United States is not an indispensable party.

United States v. *Lee*, 106 U. S. 196.
Osborn v. *Bank*, 9 Wheat. 738.
Tindal v. *Wesley*, 167 U. S. 204.
Lane, Sec'y of the Interior v. *Watts*, 234 U. S. 525.
Philadelphia County v. *Stimson*, 223 U. S. 605.
Sloan Shipyards Corp. v. *U. S. S. Bd. E. F. Corp.*, 258 U. S. 549, 566, 567.
Ervin v. *Quintanilla*, 99 Fed. (2d) 935-939.

Petitioner seeks to avoid the effect of the above decisions of this Court by reference to a few cases including *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 452; *Stanley* v. *Schwalby*, 162 U. S. 255, 270, 271; *Haskins Bro. & Co.* v. *Morgenthau*, 85 Fed. (2) 677, 683.

Cunningham v. *Macon, etc. RR. Co., supra*, involved the attempted foreclosure of a mortgage on property to which the Governor of Georgia and other officials held possession and title, and the Court distinguished the case from *United States* v. *Lee, supra*, for there the United States neither was in possession of the property nor had any interest in it.

Stanley v. *Schwalby, supra*, involved an action of trespass and the Court examined the merits and decided against the contention of plaintiffs. In making the distinction between the case at bar and the *Lee* case the Court stated (at 271):

> "And this Court distinctly recognized that, if the title of the United States were good, it would be a justification of the defendants; that the United States could not be sued directly by original process as a defendant except by virtue of an express act of Congress; and that the United States would not be bound or concluded by the judgment of their officers."

Haskins Bros. et al. v. *Morgenthau, supra*, in which the opinion was written by the same Justice who wrote the opinion in the instant case, involved the attempted recovery of processing taxes which had been collected and *deposited in the United States Treasury* and thereby became "public moneys of the United States subject to withdrawal only by an Act of Congress * * *".

The very distinction now being made by respondent was thus made by the Court below in the last cited case.

Petitioners urge in their Argument (pet. p. 13 and footnotes) that the decree below was not a decree for restitution of the proceeds of the bonds, since the tracing of the *res*, if attempted, was merely a means of determining dam-

ages for a breach of trust, and that the decree was in substance merely a money judgment. In answer to this contention it should be stated that the form of decree resulted from the circumstances surrounding the sale of the illegally pledged assets, and that adjustments were required to be made as credits to petitioner (defendant below) by reason of dividends paid to general creditors, said adjustments being made as of the date of the payment of said dividends and as a result of computations made accordingly. The decree in the trial court was entered containing thereon the legend "no objection to the form" (R. 24), and signed in behalf of petitioner. No objection to such form may now be made. The decree could as well have directed restitution of the proceeds of the bonds, less the deduction of credits. The money judgment merely represents the amount of the liability of the petitioner to account to respondent as prayed in the bill. But since petitioner (defendant below) specifically found no objection to the form of the decree, he will not be heard to question it now.

CONCLUSION.

There being no novel question involved in this case and the decision of the lower court being in strict accord with applicable decisions of this Court, it is respectfully submitted that the petition on behalf of Harry H. Woodring and H. A. A. Smith, for writ of certiorari to the United States Court of Appeals for the District of Columbia, be denied.

Respectfully submitted,

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Attorneys for Justus S. Wardell,
Respondent.

APPENDIX A.

TO REPEAL THE EXECUTIVE ORDER OF SEPT. 8, 1911, ESTABLISHING THE POSTAL SAVINGS SYSTEM IN THE CANAL ZONE.

By virtue of the authority vested in me, I hereby establish the following order for the Canal Zone:

Section 1. The Executive Order of *September 8, 1911,* establishing the Postal Savings System in the Canal Zone, is hereby repealed: *Provided,* That accounts opened in accordance with that order, and the regulations established thereunder, shall continue as prescribed in said order and regulations until they are finally closed by the withdrawal of the deposits.

Section 2. For the accommodation of persons desiring to deposit their savings in the post offices of the Canal Zone, *money orders may be issued in the Canal Zone payable to the purchaser at the office of issue, for which no fee shall be charged.*

Section 3. This order shall take effect from and after October 1, 1914.

WOODROW WILSON.

THE WHITE HOUSE, 5 September, 1914.

[No. 2040.]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 5.

HARRY H. WOODRING, Secretary of War, and H. A. A. SMITH, General Purchasing Officer and Chief of Washington Office, Panama Canal, *Petitioners,*

v.

JUSTUS S. WARDELL, Receiver, District National Bank of Washington, D. C., *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE RESPONDENT.

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IN THE

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OCTOBER TERM, 1939.

No. 5.

HARRY H. WOODRING, Secretary of War, and H. A. A. SMITH, General Purchasing Officer and Chief of Washington Office, Panama Canal, *Petitioners,*

v.

JUSTUS S. WARDELL, Receiver, District National Bank of Washington, D. C., *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The judgment in the District Court was entered without an opinion (R. 23-24). The opinion of the United States Court of Appeals for the District of Columbia (R. 27-28) is reported in 100 F. (2d) 690.

JURISDICTION.

The Jurisdiction of this Court was invoked under Sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and the petition for a writ of certiorari was granted on March 13, 1939 (R. 31).

QUESTIONS PRESENTED.

On June 4, 1936, respondent's predecessor in office as Receiver of the District National Bank of Washington, D. C., an insolvent national bank, filed an amended bill of complaint against the predecessors in office of petitioners to recover certain bonds of the bank, or the proceeds thereof upon the theory that the pledging of these assets by the bank before its closing to secure deposits of money order funds derived from the Panama Canal Zone was neither authorized nor required by an Act of Congress and hence was illegal, *ultra vires* and void.

In the petition for certiorari, the following questions were presented:

(1) Is the United States an indispensable party defendant?

(2) Under the circumstances of this case, was the giving of security by the national bank invalid?

It was stated in the petition for certiorari that if certiorari were granted it was proposed to consider also the question whether, if the deposit was invalid, the bank became a trustee *ex maleficio* of the funds involved. This point, however, has been abandoned in petitioners' brief.

STATUTES INVOLVED.

The statutes involved, and other public documents referred to, are either set forth in the separately printed appendix hereto or reference herein is made to the separately printed appendix to petitioners' brief.

STATEMENT OF FACTS.

The case is before this Court upon the pleadings consisting of an amended bill of complaint (R. 1-11); orders regarding the substitution of the party plaintiff and the parties defendant (R. 11-12); and answer (R. 12-22); and a motion to strike certain defenses and for the entry of a decree *pro confesso* against the petitioners (R. 22-23); the judgment of the District Court (R. 23-24); and the judgment of the court below affirming the judgment of the District Court (R. 27-28).

In paragraph numbered 5 (b) of the amended bill of complaint (R. 2), it was stated that the defendants and each of them (petitioners here) were sued in both their individual and official capacities.

The facts may be summarized as follows:

On August 18, 1914, under a contract with the officers of the District National Bank of Washington, D. C. (R. 8-11), the Secretary of War opened two deposit accounts in the bank which was a national banking association (R. 2-3). One of those accounts was designated "Secretary of War, Canal Zone Funds, Call Account"; the other "Secretary of War, Canal Zone Funds, Checking Account" (R. 2, 3).

As security for the safekeeping and repayment of such deposits, the officers of the bank delivered to the then Purchasing Officer of the Panama Canal certain of the bank's assets consisting of certain bonds of the aggregate par value of $274,200. (R. 3.) On March 5, 1933, the bank was closed by proclamation of the President of the United States and was never thereafter reopened and was found and determined to be insolvent by the Comptroller of the Currency of the United States, who appointed a Conservator for the bank on March 14, 1933, and who appointed a Receiver on November 6, 1933, and who subsequently appointed a successor Receiver (respondent herein) (R. 2, 11). At the time of the closing of the bank, the credit balance in the "Call Account" amounted to $200,000. and

the credit balance in the "Checking Account" amounted to $14,739.80 (R. 2, 3). The deposits for which said securities were pledged were at the time of the closing of the bank almost entirely composed of moneys received by the Postal Service of the Canal Zone and consisted of deposit money order funds and money order funds (R. 14).

On September 24, 1933, the securities were sold to the Hamilton National Bank under an agreement and arrangement by the then Secretary of War and the then General Purchasing Officer of the Panama Canal with the then Conservator of the bank (R. 3-13) and from the proceeds of the sale, the then Secretary of War was paid $214,739.80 constituting the combined balance of the two accounts and an additional sum amounting to $3,535.37, representing alleged accrued interest upon said deposit balance to and including September 24, 1933, said above described sums being paid to the then Secretary of War and the then General Purchasing Officer of the Panama Canal by the setting up of the new deposit account in the Hamilton National Bank of Washington, D. C., in the name of the Secretary of War, Canal Zone Funds (R. 3).

On June 4, 1936, the then Receiver of the District National Bank of Washington sued the petitioners to recover that part of the proceeds of the pledged bonds which represented an amount in excess of the distributed dividends paid to general creditors. It was shown by the bill of complaint that all depositors and creditors of the District National Bank of Washington had received a five per cent distribution on claims on March 1, 1933 and that a further distribution of 50 per cent on the amount of the provable claims against the bank had been paid on September 24, 1933 (R. 4). It was conceded by the bill of complaint that petitioners were entitled to like credits (R. 4) as well as credits on account of any further dividends paid to general creditors.

The basis for this suit as averred in the amended bill of complaint was that the pledging of the bank's assets to se-

cure the deposits in question was without authority of law and hence that the then Secretary of War was without authority of law to receive and accept such assets so pledged as collateral security or in any capacity other than in trust for the bank, and that when the bonds were sold, following the closing of the bank, the proceeds were illegally paid under a mistake of law to the then Secretary of War, and that such proceeds were being held illegally and in trust for the benefit of the depositors, creditors and stockholders of the District National Bank of Washington, and as such were recoverable by plaintiff from petitioners, together with interest at the legal rate from September 24, 1933, the date of the illegal payment, less an allowance for dividends paid to general creditors (R. 3-4).

In paragraph numbered 9 of the bill of complaint (R. 6), it was averred that the funds claimed by respondent "are not moneys of the United States, are not part of the revenues of the United States, and are not subject to the control of the Secretary of the Treasury of the United States in his official capacity as Secretary of the Treasury with respect to moneys of the United States," and "are not moneys of the Panama Canal," and "all of said moneys claimed by plaintiff in said bill of complaint are part of the trust assets of the insolvent District National Bank of Washington, D. C., belonging to the general creditors of the bank, out of which trust assets all creditors are entitled to be paid ratably." It was also averred that said funds "have not been covered into the Treasury of the United States or the Treasury of any State, territory or other government." It was further averred "that the District National Bank of Washington, D. C., was never designated by the Secretary of the Treasury under regulations prescribed by said Secretary, to receive deposits of the Government of the Canal Zone • • • nor did the Secretary of the Treasury exact from said District National Bank of Washington, D. C., the pledges of securities which are the subject matter of this suit."

In petitioners' answer to paragraph numbered 9 of the bill of complaint (R. 20), the petitioners "admit that the funds and money referred to in paragraph numbered 7, to wit, the so-called Panama Canal funds, are not public funds and are not part of the revenues of the United States; that they are not subject to the control of the Secretary of the Treasury in his official capacity as such Secretary in respect of public moneys of the United States; but in this connection, they aver that the interest accruing on said moneys is a part of the revenues of the United States; and further that in respect of such of said moneys as were derived from the issuance of Postal Money Orders, they are funds for the payment of which the United States is responsible and obligated." Further, petitioners denied "that said moneys are not moneys of the Panama Canal, as alleged in said paragraph, and on the contrary aver that they are moneys of the said Panama Canal." Further, petitioners "admit that the District National Bank was never designated by the Secretary of the Treasury as depositary of the Government of the Canal Zone, but say that the Secretary of the Treasury did approve of the depositing in the said District National Bank of moneys of the Panama Canal." Further, petitioners "admit that the Secretary of the Treasury did not exact of the said Bank, the pledge of the securities given to insure the deposits of the Panama Canal funds but they aver that the Secretary of the Treasury was consulted by the Secretary of War in respect of the latter's proposal to require securities for said deposits and approved the same."[1]

The respondent's motion to strike certain parts of the answer and for the entry of a decree *pro confesso* was granted by the trial court and a judgment was entered against the petitioners (R. 22-24). On appeal, the United States Court of Appeals for the District of Columbia affirmed the judgment below (R. 28).

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[1] In a separate defense (R. 16) petitioners averred that the deposits "were of monies of the United States, so deposited by agents of the United States."

SUMMARY OF ARGUMENT.

I.

There is no congressional policy in favor of giving preference to United States Government deposits in banks. Even though Congress had provided that claims of the United States against all insolvents shall have priority over all other claims, this Court has held consistently that such rule does not apply to claims of the United States against insolvent national banks.

The general power given to national banks to secure public deposits relates specifically to public money of the United States and entrusts only to the Secretary of the Treasury the power to designate the depositaries and the making of deposits, and such designations are coupled with various important duties to be performed by the Secretary and the banks.

Whenever Congress has desired to authorize the securing of deposits of funds in public custody which might not be, strictly speaking, United States public money, it has done so by a specific Act.

At the time the deposits here in question were made and ever since, it has been recognized that they did not constitute public money of the United States and did not fall under any statute authorizing the securing of deposits in national banks.

Petitioners admit in their answer that the pledges were not made under Sec. 90, Title 12, U. S. C.

There is no specific Act of Congress authorizing the pledge of securities by national banks to secure deposits of Canal Zone money order funds.

There was no rule or regulation having the effect of an act of Congress authorizing the pledging of the bank's assets to secure these deposits.

The lack of statutory authority cannot be supplied either by custom or usage or by the sanction and approval of the Comptroller of the Currency or other executive officers.

II.

The pledge, being unauthorized, was void, and neither the pledgees, the Canal Zone, nor the United States acquired any right or interest in the illegally pledged bonds or the proceeds thereof, which at all times remained the property of the bank.

An unauthorized pledge of a national bank's assets being void, the receiver is entitled to recover the pledged property or the proceeds thereof.

Since the possession of petitioners results from a void act, their possession is personal, not official, and, therefore, a suit against them is not a suit against the United States.

The fund sought to be recovered has not been covered into the Treasury of the United States, is not part of the revenues of the United States and is not public money of the United States.

The doctrine of sovereign immunity does not apply because, the United States having no interest in the fund sought to be recovered, is not an indispensable party to the suit.

ARGUMENT.

I.

The Pledges Were Invalid.

A—Status of public and private deposits in national banks, both unsecured and secured.

As a preliminary to consideration of the legality of the pledge involved here, it will be helpful to examine the status of deposits both public and private in national banks, unsecured as well as secured.

The relevant statutes involved in this consideration are Sec. 191, Title 31, U. S. C. (R. S., sec. 3466, derived from Sec. 5 of the Act of March 3, 1797), Sec. 24, Title 12, U. S. C., (R. S., sec. 5136), derived from Sec. 8 of the original National Bank Act (Act of June 3, 1864) defining the cor-

porate powers of national banking associations; Sec. 90, Title 12, U. S. C. (R. S., sec. 5153), derived from Sec. 45 of the original National Bank Act of June 3, 1864, covering the securing of public money deposited in national banks by the Secretary of the Treasury; Sec. 192, Title 12, U. S. C. (R. S., sec. 5234), derived from Sec. 50 of the National Bank Act of June 3, 1864, covering among other things, the collection by receivers appointed by the Comptroller of the Currency of claims owing to insolvent national banks; and Sec. 194, Title 12, U. S. C. (R. S., sec. 5236), derived from Sec. 50 of the National Bank Act of June 3, 1864, providing for the payment by the Comptroller of the Currency of ratable dividends on all claims against insolvent national banks; and R. S. sec. 5242 (Sec. 91, Title 12, U. S. C.), prohibiting preferential transfers of assets made in contemplation of insolvency.

1. THERE IS NO CONGRESSIONAL POLICY IN FAVOR OF GIVING PREFERENCE TO UNITED STATES GOVERNMENT DEPOSITS IN BANKS. EVEN THOUGH CONGRESS HAD PROVIDED THAT CLAIMS OF THE UNITED STATES AGAINST ALL INSOLVENTS SHALL HAVE PRIORITY OVER ALL OTHER CLAIMS, THIS COURT HAS HELD CONSISTENTLY THAT SUCH RULE DOES NOT APPLY TO CLAIMS OF THE UNITED STATES AGAINST INSOLVENT NATIONAL BANKS.

With respect to the policy established by Congress on the relationship between national banks and deposits therein of government funds, the first point of importance is that although as early as March 3, 1797, Congress provided that United States Government claims against insolvent debtors generally should be given priority over all other claims, this rule does not apply to United States Government claims against insolvent national banks.

The rule with respect to the priority of government claims generally against insolvents is now embodied in Revised Statutes, Sec. 3466, which by the terms of that statute

applies "whenever any person indebted to the United States is insolvent." This statute provides:

> "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

The rule that this section and the policy embodied therein does not apply to insolvent national banks was definitely decided in *Cook County National Bank* v. *U. S.*, 107 U. S. 445 (1882) and has been followed consistently ever since. That case is of particular importance as showing in detail the opinion of this Court with respect to the policy of Congress both on secured and unsecured government deposits in insolvent national banks. Discussing the National Bank Act and its relation to deposits of public funds in that case, this Court said (at p. 448):

> "We consider that Act (the National Bank Act) as constituting by itself a complete system for the establishment and government of national banks, prescribing the manner in which they may be formed, the amount of circulating notes they may issue, the security to be furnished for the redemption of those in circulation; their obligations as depositaries of public moneys, and as such to furnish security for the deposits, * * *. Everything essential to the formation of the banks, the issue, security and redemption of their notes, the winding up of the institutions and the distribution of their effects, are fully provided for, as in a separate code by itself, neither limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents or their estates. * * *

"In the second place, when the banks are made depositaries of public moneys and employed as financial agents of the government, it is the duty of the Secretary of the Treasury to require them to give satisfactory security, by the deposit of United States bonds or otherwise, for the safe-keeping and prompt payment of the public money deposited and for the faithful performance of their duties as financial agents. The amount of security which the Secretary may thus require has no limit but his own judgment as to its necessity. Every officer of a bank which is not an authorized depositary, and which has not therefore given the required security, who knowingly receives any public money on deposit, is liable for embezzlement. R. S., sec. 5497. The Government can thus always have security, limited in amount only by the judgment of the Secretary of the Treasury, for public moneys deposited with any national bank.

"With these provisions for security against possible loss for moneys deposited, it would seem only equitable that the Government should call for such security and, if it prove insufficient, take the position of other creditors in the distribution of the assets of the bank in case of its failure. The framers of the banking law evidently so regarded the matter."

The Court then referred to the provisions of Revised Statutes, sec. 5236 (Sec. 194, Title 12, U. S. C.), for the making of ratable dividends by the Comptroller of the Currency on all claims proved to his satisfaction or adjudicated in a court of competent jurisdiction. The Court then said (at p. 450):

"These provisions could not be carried out if the United States were entitled to priority in the payment of a demand note arising from advances made to redeem the circulating notes. The balance, after reimbursement of the advances, could not be distributed as directed, by a ratable dividend to all holders of claims, that is, to all creditors.

"These provisions must be deemed, therefore, to withdraw national banks, which have failed, from the class of insolvent persons out of whose estate demands

of the United States are to be paid in preference to the claims of other creditors."

The *Cook County National Bank* case is interesting in another aspect. Prior to closing, the bank, in addition to depositing bonds with the Secretary of the Treasury to secure the deposits in the bank of public money, had also, in accordance with law, deposited other bonds as security for the circulating notes of the bank. In addition, the Treasury Department held a considerable sum belonging to the bank collected from bills receivable and debts due to it. One of the chief points of the case was whether the United States could apply against the deposits of public money in the bank such general assets and the excess of the bonds deposited as security for the circulating notes of the bank. This Court held that it could not make such application and that the United States would have to suffer a loss as to the part of the public money deposited in the bank, which was not secured under Section 45 (now Sec. 90, Title 12, U. S. C.). Speaking of such excess securities, money and so forth, this Court said (at pp. 452, 453):

"The Bank could have claimed their return at any time upon a surrender of the notes. The surplus constituted the assets of the Bank, and part of the fund appropriated by the statute for its creditors. It was charged with this liability, and was held subject to it after the purposes of the original trust were accomplished, although remaining in the Treasury. It was then subject to a new trust. A trustee cannot set off against the funds held by him in that character his individual demand against the grantor of the trust. Courts of equity and courts of law will not allow such an application of the funds so long as they are affected by any trust. It would open the door to all sorts of chicanery and fraud. The fund must be relieved from its trust character before it can be treated in any other character.

* * *

"Here the surplus being a fund for all the creditors, was subject to be distributed to them immediately upon the re-imbursement of the advances of the United States, and the right of the creditors to it was not affected by the fact that it was at the time in the actual possession of the treasury department.

"Nor is the relation of the United States to this fund changed by the forfeiture of the bonds, which the comptroller of the currency, was authorized, upon the failure of the Bank, to declare. The forfeiture was not a confiscation of the bonds to the Government. It amounted only to an appropriation of them, against any other claim, to the specific purposes for which they had been deposited, authorizing their cancellation at market value when not above par, or their sale, so far as necessary to redeem the circulation or re-imburse the United States for moneys advanced for that purpose. When that purpose was accomplished, the Bank had the right to any surplus of their proceeds, equally as though that right had been in express terms declared."

It is true that *Cook County National Bank* v. *U. S.* was in the form of an action brought by the United States. But had the United States not thus taken the initiative to establish the legality of its holding of the bank's assets, it seems likely that an action by the bank, or its receiver, to establish the same right would have been entertained.

The clear effect of the decision of this Court in the Cook County National Bank case is that unless public funds have been secured in accordance with law, the United States government is entitled to no priority over other depositors against insolvent national banks, although with respect to all other insolvents, it does have such a priority.

2. THERE IS NO GENERAL POWER GIVEN BY THE NATIONAL BANK ACT TO NATIONAL BANKS TO PLEDGE ASSETS TO SECURE DEPOSITS AND THE GENERAL POLICY OF THE NATIONAL BANK ACT IS TO PLACE ALL DEPOSITS, PUBLIC AND PRIVATE, ON AN EQUALITY AND ENTITLED TO RATABLE DIVIDENDS WHEN INSOLVENCY INTERVENES.

The second point of importance in this connection is that the securing of deposits, either public or private, is not a necessary incident of the business of national banks and that unless the securing of a deposit by a national bank has been specifically authorized by an Act of Congress, such pledge of the assets of the bank is illegal, *ultra vires*, and void *ab initio*. Recalling that as a result of the *Cook County National Bank* case, *supra*, public deposits and private deposits stand on an absolute equality with respect to priority against insolvent national banks, the necessity for specific statutory authority for a pledge to secure any sort of deposit was decided by this Court in *Texas & Pacific Railway Company* v. *Pottorff*, 291 U. S. 245, 253-260; *City of Marion, Illinois* v. *Sneeden*, 291 U. S. 262, 268; *Lewis* v. *Fidelity and Deposit Co.*, 292 U. S. 559, 564.

While the *Pottorff* case involved the attempt to secure the deposit of a private depositor (The Texas & Pacific Railway Company) the decision and opinion of this Court disposed of several contentions made by petitioner in this case and brought up to date from the time of the *Cook County National Bank* case, *supra*, the position of this Court towards efforts to secure deposits in national banks, especially the position taken by petitioner in this case that the power to give security is included among the incidental powers of national banks. Discussing the policy of Congress in this respect in enacting the National Bank Act, this Court in the *Pottorff* case said (at p. 255):

"To permit the pledge would be inconsistent with many provisions of the National Bank Act which are designed to insure, in case of disaster, uniformity in

the treatment of depositors and a ratable distribution of assets. Compare *Davis* v. *Elmira Sav. Bank*, 161 U. S. 275, 290. This policy of equal treatment was held to preclude, in case of a national bank, even the preference under Section 3466 of the Revised Statutes, U. S. C. title 31, section 191, which otherwise is accorded to the United States when its debtor becomes insolvent. *Cook County Nat. Bank* v. *United States*, 107 U. S. 445. The effect of a pledge is to withdraw for the benefit of one depositor part of the fund to which all look for protection. Thereby the legitimate expectations of a great body of the depositors are defeated and confidence in the fairness of the national banking laws and administration is impaired. It is no answer to say that the other depositors are benefited by the increased resources which the pledge brings to the bank, or at least are not harmed, since the new funds take the place of the securities pledged and are available to meet liabilities. The immediate safety of unsecured creditors depends on the bank remaining open and solvent; the pledge reduces the fund of quick assets available to meet unusual demands without any assurance that the deposit will be used to replenish this fund."

Referring specifically to the contention identical with the contention made by petitioners in the instant case that the provision in the National Bank Act (Sec. 90, Title 12, U. S. C.) authorizing the Secretary of the Treasury to demand security for deposits by him of public money, assumed the giving of security to be an incidental power of national banks generally, this Court said in the *Pottorff* case (at p. 257, 258):

"The Railway insists that Congress in providing that the Secretary of the Treasury might deposit public money in national banks upon receiving satisfactory security by 'the deposit of United States bonds or otherwise,' Act of June 3, 1864, assumed a general power in national banks to pledge their assets to secure deposits; and that the assumption indicates that it intended this power to be among the 'incidental'

> powers granted by section 8. But without such assumption, the duty of the Secretary to demand a pledge authorizes a national bank to make it. We may not import into section 8 a meaning not derivable from the words of that section and inconsistent with other provisions of the Act."

The Court having thus in the *Pottorff* case decided that all pledges by national banks of their assets to secure all deposits of private depositors were invalid, the next step was the decision of the Court on the same day that national banks had no power to pledge their assets to secure any deposits, even public deposits, which had not been specifically authorized by Congress.

City of Marion v. *Sneeden, supra,* involved the effort to secure the deposit of a municipality in Illinois. In deciding that the pledge involved was invalid, this Court said (at page 268):

> "For the reasons stated in *Texas & P. R. Co.* v. *Pottorff,* No. 128, decided this day, we are of opinion that the Act of 1864 did not confer the power to pledge assets to secure any public deposits except those made under section 45 by the Secretary of the Treasury of the United States. The power conferred by each later act, except that of 1930, was limited to securing specific Federal funds."

In view of the contention here that the power to exact the pledges in question is to be implied, the reasoning of this Court in the Sneeden case is important. There, admittedly, Congress by the 1930 amendment to the National Bank Act had authorized national banks to give security for the payment of deposits of states or political subdivisions thereof "of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State." Admittedly also the laws of Illinois provided for the banks in that State to secure the deposits of the State itself, and the question was whether Illinois also permitted banks

there to secure the deposits of political subdivisions of the States. Several statutes and decisions of the Illinois courts thereon were relied upon as giving such power impliedly, but this Court held that in order to comply with the federal statute, there must be an Illinois statute conferring the power in express terms. This Court said (at p. 269):

> "No Illinois statute confers in express terms upon banks organized under its laws either the general power to pledge assets to secure a deposit; or the general power to pledge assets to secure public deposits. A statute confers in terms the power to pledge assets to secure deposits of the States but there is none which so confers the power to pledge assets to secure public deposits of a political subdivision of the State."

In the absence of such a specific statute, this Court held the pledge there involved to be invalid.

Furthermore, in the Sneeden case, there was involved a statute of the State of Illinois (291 U. S. 266, 267) which required the treasurer of a city to deposit his city funds in banks only after the depositary bank had given a bond with sureties, conditioned that the bank would safely keep and account for and pay over the public deposit. Instead of the depositary bank executing its bonds with sureties, it deposited as collateral the securities involved in the case. In other words, the provisions of the Illinois statute in this respect were practically identical with the then existing provisions of Sec. 101, Title 11, U. S. C., with respect to securing deposits of United States bankruptcy funds.[2] It was urged in the Sneeden case that such Illinois statute was at least a substantial compliance with the June 25, 1930 amendment to Sec. 90, Title 12. This Court rejected this contention and held that there must be a specific statute authorizing the pledge.

Petitioners seek to escape the effect of the Sneeden case by stating that "the validity of the pledge follows from the

[2] See footnote 4.

general governmental character of the deposit." The point is not stressed in the brief for the petitioners in the District National Bank case, but is dwelt upon in the brief for the petitioners in the Commercial National Bank case. There it was urged that only the private aspect of national banks was considered in the Pottorff and Sneeden cases, and that a different rule should apply where a national bank, as an instrumentality of the Federal government, secures the public funds of that government. No authority was urged in support of such a position. What petitioners overlook is that in both the Pottorff and Sneeden cases, this Court was dealing primarily with the *powers of national banks* and it was in that connection in the Sneeden case that this Court said that the National Bank Act "*did not confer the power to pledge assets to secure any public deposits*" except those specified by specific Acts of Congress.

Further, while the Sneeden case did not involve a deposit of any United States government department, it did involve a public deposit in the sense that the deposit belonged to the municipality of Marion, Illinois. Since, as shown by the Cook County National Bank case, this Court has held that public deposits of the United States government have no priority over other national bank deposits, it is clear that nowhere has Congress indicated a policy of discriminating in favor of public deposits of the United States over public deposits of States, or political subdivisions of States. In the Sneeden case, precisely the same argument was made to the effect that the deposits there involved being public in character, it should be assumed that the power to secure them existed. It was shown in the Sneeden case (as distinguished from the Pottorff case) that the practice on the part of national banks of securing deposits of States and political subdivisions of States was widespread. In fact, in the Sneeden case, the Philippine Islands, appearing as amicus curiae, filed a brief before the decision and then filed a petition for rehearing and quoted therein a letter from the then Comptroller of the Currency

showing that the practice by national banks of securing public deposits of all sorts (including the deposits of the Philippine Islands) was widespread and had continued for many years. This Court considered these points and yet in the Sneeden case denied a rehearing March 12, 1934 (291 U. S. 651).

In addition, Congress has not confined the authority to deposit public money of the United States to national banks, and thus the public character of national banks does not enter the discussion. By the terms of the Act of Congress approved December 23, 1913, c. 6, Sec. 9, 38 Stat. 259, as amended (Sec. 332, Title 12, U. S. C.) Congress provided that "all banks or trust companies incorporated by special law or organized under the general laws of *any State*, which are members of the Federal Reserve System, when designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money," and provided further in the same statute that "the Secretary of the Treasury shall require of the banks and trust companies thus designated satisfactory security, by the deposit of United States bonds or otherwise, for the safekeeping and prompt payment of the public money deposited with them and for the faithful performance of their duties as financial agents of the government." (The deposits in the District National Bank were not made until August 18, 1914, which was after the establishment of the Federal Reserve System (R. 2). Whether Congress had the power to thus legislate with respect to State banks is not in point here.)

As a matter of fact, with the creation by Congress in 1913 of the Federal Reserve System, the practice of using banks aside from Federal Reserve Banks as general depositaries for public money began to be decreased, with the result that in 1920, thirteen years before the District National Bank became insolvent, the Assistant Secretary of the Treasury wrote to the District National Bank that:

"Having discontinued all national bank depositaries in states where Federal Reserve Banks and branch Federal Reserve Banks are located and equipped to transact the government's business, the Treasury feels that it must, as a measure of consistency and administrative economy, discontinue national bank depositaries in the city of Washington where the office of Treasurer of the United States is located."[3]

In *Lewis* v. *Fidelity & Deposit Co., supra,* involving the deposit in a national bank funds of the State of Georgia, this Court reaffirmed its position, saying (at p. 564):

"In *Texas & P. R. Co.* v. *Pottorff*, 291 U. S. 245, and *Marion* v. *Sneeden*, 291 U. S. 262, decided after the entry of the judgment below, we held that a national bank had, prior to the Act of June 25, 1930, *no power to make any pledge to secure deposits except the federal deposits specifically provided for by Acts of Congress.*" (Emphasis supplied.)

3. The General Power Given to National Banks to Secure Public Deposits Relates Specifically to Public Money of the United States and Entrusts Only to the Secretary of the Treasury the Power to Designate the Depositaries and the Making of Deposits, and Such Designations are Coupled With Various Important Duties to be Performed by the Secretary and the Banks.

Congress has intended ever since the establishment of the national banking system by the National Bank Act of June 3, 1864, that *public money of the United States* shall be deposited in national banks only when such banks have been designated by the Secretary of the Treasury as depositaries of public money and financial agents of the government, and security taken therefor.

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[3] Page 37 of the separately printed appendix hereto.

Two statutes showing this congressional intent are, first, R. S., sec. 5153 (Sec. 90, Title 12, U. S. C.), derived from Sec. 45 of the original bank act. This section is as follows:

"Depositaries of public moneys and financial agents of Government.

"All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: *Provided*, That the Secretary shall, on or before the 1st of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks; *Provided*, That the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections.

"Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

veral important points arise in connection with this te, namely,

First, the statute provides that national banks, in order to act as public depositaries under this section, shall be designated as such by the Secretary of the Treasury. That this duty rests upon the Secretary of the Treasury only is clear from the language of the statute. As the United States Court of Appeals for the District of Columbia said in *O'Connor* v. *Rhodes*, 79 F. (2d) 146, 150; 297 U. S. 383:

> "The duty imposed on the Secretary, as we think, is personal and results from the statute we have been discussing, and that Congress meant its language and provisions to be taken literally, follows, we think, from the fact that by later acts, to which we shall now refer, Congress to cover the case of deposits of Federal funds made by others than the Secretary of the Treasury, has specifically provided for such cases by appropriate statutes."

Second, the selection and continuance of certain national banks by the Secretary of the Treasury as depositaries of the public money of the United States was not intended as a naked designation, but was to be coupled with the making by the Secretary of the Treasury of regulations with respect to such designations and the annual review by the Secretary of the Treasury of the securities required by the Secretary of the Treasury to secure such deposits of public money. The detailed safeguards with which the Secretary of the Treasury surrounds such designations of depositaries under Sec. 90 is shown by the copy of the regulations issued December 31, 1919, printed in the separately printed appendix hereto at page 14.

Third, the District National Bank of Washington was not designated by the Secretary of the Treasury as a depositary of public moneys to cover the amounts which would have been required by the deposits involved here. Printed in the separately printed appendix hereto at pages 36-40, are all of the designations of the District National Bank of Washington as a depositary of public

moneys from 1913 to 1933, inclusive. These designations show that on April 4, 1913, the District National Bank of Washington was designated as a depositary for balances up to $50,000.; that on November 15, 1917, such bank was designated only as a special depositary to receive proceeds of the sale of Treasury certificates of indebtedness; that on March 24, 1920, because of the transfer of public moneys in the District of Columbia to the Treasurer of the United States, all prior designations of the District National Bank of Washington as a public depositary were canceled; that on January 23, 1930, a previous designation of the District National Bank of Washington as a limited depositary of public moneys (proceeds from the sale of Treasury certificates of indebtedness, under a separate statute) was canceled. It resulted, therefore, that from 1920 until the date of the closing of the bank, the District National Bank of Washington did not hold any designation from the Secretary of the Treasury as a depositary for public moneys under Sec. 90, Title 12, U. S. C.

Furthermore, even had the District National Bank of Washington held such a designation from the Secretary of the Treasury, under Sec. 90, Title 12, U. S. C., this would not have changed the situation. Precisely such a situation arose in *Branch* v. *U. S.*, 100 U. S. 673, 674, where a clerk of a United States District Court acting under instructions from the Secretary of the Interior deposited in a national bank which had been regularly designated as a public depositary by the Secretary of the Treasury funds representing the proceeds of certain seized property. The money had actually been received by the United States Marshal and by him turned over to the clerk of the court and by the clerk of the court deposited in the bank to his own credit "as clerk." This Court held that the mere depositing of such money under such conditions in a regularly designated depositary did not make the money in question public money of the United States.

The other statute showing that deposits of public money of the United States can be lawfully made in banks only when such banks have been duly designated as authorized depositaries of public moneys, is the Act of March 4, 1909, c. 321, Sec. 96, 35 Stat. 1106, Sec. 182, Title 18, U. S. C., providing:

> "Every banker, broker, or other person not an authorized depositary of public moneys, who shall knowingly receive from any disbursing officer, or collector of internal revenue, or other agent of the United States, any public money on deposit, or by way of loan or accommodation, with or without interest, or otherwise than in payment of a debt against the United States, or shall use, transfer, convert, appropriate, or apply any portion of the public money for any purpose not prescribed by law; and every president, cashier, teller, director, or other officer of any bank or banking association who shall violate any provision of this section is guilty of embezzlement of the public money so deposited, loaned, transferred, used, converted, appropriated, or applied, and shall be fined not more than the amount embezzled, or imprisoned not more than ten years, or both."

4. WHENEVER CONGRESS HAS DESIRED TO AUTHORIZE THE SECURING OF DEPOSITS OF FUNDS IN PUBLIC CUSTODY WHICH MIGHT NOT BE, STRICTLY SPEAKING, UNITED STATES PUBLIC MONEY, IT HAS DONE SO BY A SPECIFIC ACT.

Examination of the Acts of Congress under which Congress has empowered various public officials to demand security when depositing designated classes of funds in national banks shows that Congress has always been specific in this regard and has never authorized such pledges by implication. This situation was referred to in footnote 11 at page 257 of the opinion of this Court in *Texas & P. R. Co.* v. *Pottorff*, *supra*, and again in *City of Marion* v. *Sneeden*, *supra*, at page 268. In each statute, Congress has made clear what public official was

to make the deposit and what public official was to designate the bank as a depositary. Obviously, if the designation of depositaries for public moneys of the United States was not to be confined to the Secretary of the Treasury and also was not to be confined to public moneys of the United States in the strict sense, there would have been no need or necessity for these various special Acts covering the securing of funds which were not public money in the strict sense, but which were in the custody of public officers of the United States, or officers of States or subdivisions thereof. The mere fact that Congress saw fit to pass a special Act in each case shows it intended that no funds in public officials' hands should be secured which were *not* required by a specific Act. A brief summary of such special specific statutes illustrates this point.

Proceeds of the collection of claims in behalf of the insolvent national banks—The deposit must be made only by the Comptroller of the Currency and must be made only in a "regular government depositary," and security required by the Comptroller of the Currency. (R. S., Sec. 5234, Sec. 192, Title 12, U. S. C.)

Bankruptcy funds—The statute provides that the depositary for bankruptcy funds shall be designated by the Bankruptcy Court by order and that the Court shall require "bonds to the United States, subject to the approval of the courts." By Sec. 15, Title 6, United States Code, Congress gave authority for the deposit of United States bonds in lieu of the giving of a bond.[4] Sec. 101, Title 11, U. S. C.

Indian moneys—The Secretary of the Interior may deposit the net receipts from the sales of surplus and unallotted lands and other tribal property belonging to any of the Five Civilized Tribes, in national or State banks in Oklahoma to be designated by him under rules and regulations to be made by him with respect to interest, time of

[4] Amended by the Act of June 22, 1938, c. 575, sec. 1, 52 Stat. 972.

deposit and withdrawal and the security therefor. Sec. 156, Title 25, U. S. C.

United States Postal Savings Funds—Only the Board of Trustees of the United States Postal Savings System may designate depositaries for United States Postal Savings Funds under rules and regulations as to the taking of security for such deposits from the banks. The Act extends the system to the District of Columbia, Alaska and Puerto Rico, but does not include Panama, Sec. 759, Title 39, U. S. C.

Public money of States and political subdivisions thereof—The securing of deposits by States and political subdivisions thereof is specifically limited to cases in which a law of the State in which the depositary is located authorizes other banking institutions in such State to so secure deposits. Sec. 90, Title 12, U. S. C.

Puerto Rico—With respect to Puerto Rico, a statute similar in terms with Sec. 90, Title 12, U. S. C., relating to the money of the United States, has been adopted by Congress under the Act of April 12, 1900, c. 191, Sec. 22, 31 Stat. 82, as amended, Sec. 780, Title 48, U. S. C., providing:

> "The treasurer shall collect and be the custodian of public funds, and shall disburse the same in accordance with law, on warrants signed by the auditor and countersigned by the governor, and perform such other duties as may be provided by law. He may designate banking institutions in Porto Rico and the United States as depositaries of the government of Porto Rico, subject to such conditions as may be prescribed by the governor, after they have filed with him satisfactory evidence of their sound financial condition and have deposited bonds of the United States or of the government of Porto Rico or other security satisfactory to the governor in such amounts as may be indicated by him; and no banking institution shall be designated a depositary of the government of Porto Rico until the foregoing conditions have been complied with. Interest on deposits shall be required and paid into the treasury."

This statute with respect to public funds of Puerto Rico was adopted by Congress regardless of the fact that in the same legislation it adopted Section 734, Title 48, U. S. C., providing that:

> "The statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal-revenue laws."

Respondent has not found any case wherein this Court has held valid the securing by national banks of any deposit, public or private, in such banks except where such securing of such deposit has been specifically authorized by a specific Act of Congress.

B—There is no Statutory Authority for These Pledges.

There was no statutory authority for the pledges, in the instant case, first, because they were not made and not pretended to have been made under the general authority given by Congress to the Secretary of the Treasury to enforce the securing of public money of the United States, second, because no Act of Congress specifically authorized the pledge of securities by national banks to secure deposits of Canal Zone money order funds, third, because there was no rule or regulation having the effect of an Act of Congress authorizing the pledging of the bank's assets to secure these deposits, and fourth, because the lack of statutory authority cannot be supplied by custom or usage or by the sanction and approval of the Comptroller of the Currency, or other executive officers.

1. *The Pledges Were Not Authorized by Sec. 90, Title 12, U. S. C. (R. S., Sec. 5153.)*

   (1) At the Time the Deposits Here in Question Were Made and Ever Since, It Has Been Recognized That They Did Not Constitute Public Money of

the United States and Did Not Fall Under Any Statute Authorizing The Securing of Deposits in National Banks.

The history of the making of the deposits involved here, and the giving of security therefor is shown by documents printed from pages 46 to 58, inclusive, of the appendix to the briefs for the petitioners. These documents show beyond dispute, first, that it was never considered that the funds deposited in the District National Bank of Washington were public moneys of the United States, and, second, it was understood from the beginning that such deposits were not covered by the laws regarding the designation of depositaries of public moneys.

As shown by these documents, the system was inaugurated at the instigation of W. W. Warwick, then Examiner of Accounts for the Isthmian Canal Commission, and later Comptroller of the Treasury of the United States, admittedly at that time the leading expert on public deposits in the United States. In his letter to Colonel Goethals, Chairman and Chief Engineer of the Isthmian Canal Commission, dated September 19, 1908, Judge Warwick explained that large amounts of money were being accumulated in the Panama Canal Zone from the proceeds of the sale of money orders to people residing on the Isthmus and that it was desirable to more adequately safeguard such funds. In such letter, Judge Warwick said:

> *"As the moneys of the Zone are not moneys of the United States, the laws regarding the designation of depositaries of public moneys do not apply."*

Judge Warwick then specifically recommended that such funds be deposited in the International Banking Corporation, with its main office in New York and branches in the Canal Zone, and mentioned specifically that such banking corporation "is not incorporated under the national banking law of the United States." He then recommended that an agreement for the securing of deposits with the Inter-

national Banking Corporation be made "from year to year through the Secretary of War," concluding:

> "The bank should furnish security to the satisfaction of the Secretary of War, either in the form of a deposit of bonds or other marketable securities payable to the Treasurer of the Canal Zone, or by the guaranty of three or more surety companies to the satisfaction of the Secretary of War."

Colonel Goethals as Chairman of the Isthmian Canal Commission on October 21, 1908, forwarded Judge Warwick's letter to the Secretary of War with a recommendation for its approval and in doing so, said:

> *"As noted in Mr. Warwick's letter, the moneys of the Zone are not moneys of the United States, so that the laws regarding the designation of depositaries of public moneys do not apply."* (Emphasis supplied.)

Thereafter, Colonel Goethals gave notice to the Secretary of War on October 24, 1908, that the International Banking Corporation had withdrawn its offer to accept deposits of Panama Canal funds and recommended to the Secretary of War that one of several other banking corporations be designated as a depositary.

Thereafter, other Secretaries of War proceeded to designate the District National Bank of Washington and the Commercial National Bank of Washington as depositaries of Panama Canal funds, made deposits in such banks and obtained security therefor. Before taking the last mentioned step, the Secretaries of War received advice from a Secretary of the Treasury and Assistant Secretary of the Treasury and a Comptroller of the Currency with regard to the safety of the banks to be designated and with regard to the kind of security then to be taken, but in the last mentioned correspondence, there was not even a pretense that the designations were being made under Sec. 90, Title 12, U. S. C., or under any other law of the United States, or that the designation of the banks was being made by the

Secretary of the Treasury, or that the securities taken were fixed by the Secretary of the Treasury under rules and regulations issued by him under Sec. 90, Title 12, U. S. C. It results, therefore, that there can be no question that everyone concerned understood that the money was being deposited by the Secretary of War, not by the Secretary of the Treasury, that the banks were being designated by the Secretary of War, not by the Secretary of the Treasury, that the moneys involved were not public moneys of the United States, and that the contracts for the securing of the deposits were not being made under the statutes relating to the securing of public moneys of the United States. All suggestions, therefore, to the contrary made in connection with this case appear to be afterthoughts.

(2) The Holding of Judge Warwick and Colonel Goethals and the Secretary of War Was Based Upon Decisions of this Court.

The basis for the holding by Judge Warwick, by Colonel Goethals and by the then Secretary of War that the money order funds derived from the Canal Zone were not public money of the United States and were not covered by the statutes for the deposit and securing of United States public money was the well documented opinion of the Comptroller of the Treasury Tracewell given to the Chairman of the Isthmian Canal Commission July 26, 1904.[5]

The request for such opinion from the Chairman of the Isthmian Canal Commission was for a ruling on a number of questions including whether various statutes of the United States, such as statutes requiring advertisements for bids on public works, and so forth, were applicable to the Panama Canal Zone. Among other questions asked was the following:

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[5] 11 C. D. 36. This decision of the Comptroller is referred to in footnote 12, page 24, of petitioners' brief and is printed in full at page 40 of the separately printed appendix to this brief.

"Are the revenues from the Government of the Canal Zone public moneys of the United States and should all receipts and disbursements of the same be accounted for to the Treasury Department?"

This question is precisely the question here involved. In his opinion, the Comptroller of the Treasury held that the Canal Zone was not a territory "incorporated" into the United States and was not covered by general federal statutes. Quoting from *Downes* v. *Bidwell*, 182 U. S. 244, 245, and *Fleming* v. *Page*, 9 How. 603, 617, Comptroller Tracewell concluded that "said Zone is not a part of the United States within a full meaning of the Constitution and laws of the country. The local revenues of said Zone must therefore be handled in accordance with such rules and regulations as the President and the Commission may authorize." The then Comptroller of the Treasury then answered the specific question of the Chairman of the Commission by stating that:

"It does not seem necessary to decide whether those revenues are in a general sense moneys of the United States because I am of opinion that they are not such moneys of the United States as are required to be accounted for to the Treasury Department." (Emphasis supplied.)

The Isthmian Canal Commission itself recognized that there was no congressional legislation whereby the Commission could secure the advantages of a government depositary for money order funds, as shown by the following minutes of a meeting of such Commission held May 2, 1906.

"The Chairman also stated that steps were being taken to establish a money order system on the Isthmus, explaining that such a system would not only serve as a convenience to the employees, but would enable the Commission to avail itself of the money received, following each pay period, reducing to that extent the necessary shipment of funds required monthly by the Disbursing Officer.

"Pursuant to the authorization of the Secretary of War, *and in the absence of Congressional legislation whereby the Commission could secure the advantages of a Government depositary on the Isthmus, through which to conduct its financial transactions,*[6] it was—

"*Resolved,* That the action of the Chairman in authorizing the shipment of United States money to the Disbursing Officer on the Isthmus, in response to his requisition for funds, and the action of the Governor of the Canal Zone, after conference with the Chairman and approved by the Chairman while on the Isthmus, for the immediate installation of a postal money-order system in the Canal Zone post offices, be approved." (Emphasis supplied)

(3) Petitioners Admit in Their Answer That the Funds Involved Were not Made Under Sec. 90, Title 12, U. S. C.

The basis for respondent's position that the funds involved here were never moneys of the United States and that the pledge here being attacked was not made under Sec. 90, Title 12, U. S. C., has been discussed in some detail, but the fact is that the issue is not before the Court because of admissions made in the answer of petitioners. As shown above in the statement of facts, in the answer to paragraph numbered 9 of the bill of complaint (R. 20) petitioners admitted "that the funds and money referred to in paragraph numbered 7, to wit, the so-called Panama Canal funds, are not public funds[7] and are not part of the revenue of the United States; that they are not subject to the control of the Secretary of the Treasury in his official capacity as such Secretary in respect of public moneys of

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[6] While the remainder of the above quoted minutes is quoted verbatim at page 19 of the appendix to the briefs for the petitioners, the part in italics referring to the absence of congressional legislation whereby the Commission could secure the advantages of a government depositary is omitted.

[7] See footnote 1.

the United States; but in this connection, they aver that the interest accruing on said moneys is a part of the revenues of the United States; * * * " Further, petitioners admitted "that the District National Bank was never designated by the Secretary of the Treasury as a depositary of the Government of the Canal Zone * * *". And further, petitioners admitted "that the Secretary of the Treasury did not exact of the said bank the pledging of the Panama Canal funds * * *." Further in the answer, it was averred that the Secretary of the Treasury was consulted about the deposits and that the funds in question were funds for the payment of which the United States "is responsible and obligated." The record is clear, therefore, that under the issues as framed, it is admitted that the funds involved are not public funds and are not part of the revenues of the United States; that they were not subject to the control of the Secretary of the Treasury; that the District National Bank was never designated as a depositary for Canal Zone funds by the Secretary of the Treasury and that the pledges in question were not exacted by the Secretary of the Treasury.

2. *There is no Specific Act of Congress Authorizing the Pledge of Securities by National Banks to Secure the Deposits of Panama Canal Zone Money Order Funds.*

It is not even urged by petitioners that any specific Act of Congress exists authorizing the deposit of Canal Zone funds in national banks, that any United States statute requires the Secretary of War, or any other officer of the Canal Zone, to exact security of national banks for Canal Zone deposits, or that there is any statute which grants to national banks the power to pledge their assets to secure deposits of Canal Zone funds.

To fill this gap, petitioners rely upon an "accounting circular" issued by the Governor of the Canal Zone which petitioners contend authorized the contract between the Secretary of War and the District National Bank and which

regulation in turn according to petitioners, was inferentially ratified by Congressional enactment. Petitioners also urge that because the deposits consisted of money order funds, and because Congress had provided that Postal Savings Funds in the Canal Zone should be covered by such United States laws as are not inapplicable, authorization existed for the pledge. Considering these contentions in the order above referred to, we must turn to the various statutes dealing with the Government of the Canal Zone.

In considering the various letters and circulars relied upon by petitioners to establish the implied authority for these pledges, it is necessary to keep in mind the following basic considerations:

(1) The court below held that the documents relied upon by the petitioners did not constitute legal authority for the pledge (100 F. (2d) 690, 688).

(2) The power to be exercised in order to make the pledges valid is the amendment of the charter of a national banking association, a creature of Congress, and Congress alone has the power to make such amendment.

(3) As of June 19, 1934, before this suit was filed, there was published under the authority of the Act of Congress approved May 17, 1928 (45 Stat. 596), a Code of Laws for the Canal Zone,[8] which, according to its preface, "embraces all the laws, relating to or applying in the Canal Zone, except such general laws of the United States as relate to or apply in the Canal Zone." Furthermore, it was stated in the preface to this Code that "the material included in the Code has its source in acts of Congress, in certain acts and ordinances of the former Isthmian Canal Commission which were ratified and confirmed as valid and binding by Congress in the Panama Canal Act of 1912, and, in a limited number of sections, in Executive orders of the

[8] "Canal Zone Code," United States Government Printing Office, Washington, 1934.

President which were likewise ratified and confirmed by Congress."

Nowhere in this publication does there appear the "accounting circular" relied upon by petitioners as the basis for the legality of these pledges, and nowhere in this publication does there appear any other authorization for the Secretary of War, or anyone else, to demand or require security for the deposit in national banks of Canal Zone funds.

By the Act of June 28, 1902, c. 1302, 32 Stat. 481 (Spooner Act) Congress authorized the President to acquire for the United States from the Republic of Columbia perpetual control of a strip of land not less than six miles wide extending from the Caribbean Sea to the Pacific Ocean. Under Sec. 7 of the Act, the Isthmian Canal Commission was created in order to "enable the President to construct the canal and works appurtenant thereto."

The Act of April 28, 1904, c. 1758, 33 Stat. 429, authorized the President to take possession of the Canal Zone, and under Sec. 2, it was provided that until the expiration of the 58th Congress, the power to make all rules and regulations necessary for the government of the Canal Zone should be vested in such person or persons, and should be exercised in such manner as the President might direct.

On May 9, 1904, the President wrote to the Secretary of War, stating that inasmuch as it was impractical for him personally to supervise and govern the Canal Zone, he was delegating the power to make all rules and regulations for the government of the Zone to the Isthmian Canal Commission, to be exercised under the supervision and direction of the Secretary of War. This letter is set out in full in the appendix, p. 71, and delegates the power of making rules and regulations for the Canal Zone to the Isthmian Canal Commission. It gives the Secretary of War general supervisory powers over the acts of that Commission, but it does not give the Secretary of War any authority to adopt any rules or regulations for the Canal Zone except through the Isthmian Canal Commission.

As is pointed out in petitioners brief, by 1912, there was a great deal of doubt as to the legality of various acts and regulations by which the Canal Zone had been governed. Accordingly, in 1912, Congress, by Sec. 2 of the Act of August 24, 37 Stat. 560, provided:

> "That all laws, orders, regulations and ordinances adopted and promulgated in the Canal Zone by order of the President for the Government and sanitation of the Canal Zone and the construction of the Panama Canal, are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide."

While the section of the Act, adopted in 1912, quoted above, ratified and confirmed "all laws, orders, regulations and ordinances" in effect in the Canal Zone by authority of the President, it is not even claimed by petitioners that prior to the enactment of the Act, there was any law, order, regulation or ordinance authorizing or requiring the securing of Canal Zone funds. The Act further empowered the President to discontinue the Isthmian Canal Commission when he saw fit. It will be noted that this Act does not and could not ratify future laws, orders, regulations or ordinances of the Canal Zone, though it does give legality to certain orders, regulations, and so forth, that had been adopted prior to 1912.

The effect of the Act of August 24, 1912 was thoroughly reviewed by this Court in *McConaughey* v. *Morrow*, 263 U. S. 39, wherein it was pointed out that it was expected to complete the construction of the Panama Canal in 1913, and that Congress and the then President recognized that upon the finishing of construction work, the status of the Panama Canal Zone naturally would change and that hence, new legislation was needed. In this Court's opinion, reference was made particularly to Sec. 2 of the Act of August 24, 1912, quoted *supra*, whereby Congress ratified and confirmed all laws, orders, regulations and ordinances theretofore promulgated by the President for the government of the Panama Canal Zone. Involved in *McCon-*

aughey v. *Morrow, supra,* was a regulation of the Isthmian Canal Commission giving free quarters, electric current, and so forth to Canal Zone employees. It was urged in that case that the Act of 1912 ratified and confirmed such regulations, but this Court denied such contention, saying (at p. 48):

> "This means laws needed and enacted to constitute the government, promote sanitation, and generally aid the construction of the canal. • • • It was only those regulations which rose to the dignity of laws which required ratification. • • • This would be to put innumerable administrative orders and rules adopted in the work, which were necessarily subject to change from time to time as conditions changed and the work progressed, into a strait-jacket, entirely inconsistent with the broad authority of the President granted in the Spooner Act and renewed in Sec. 4 of the same Canal Act of 1912."

Executive Orders and Governor's Circulars.

By Executive Order of January 27, 1914, the President erminated the services of the Isthmian Canal Commission nd set up a permanent organization for the government of he Canal Zone.[*]

Since this Executive order is relied upon by petitioners one of the chief sources of the implied authority for the action of the pledges involved here, the terms of such xecutive Order become important. The only part of such xecutive Order (which by its terms became effective April 1914) important here was the paragraph dealing with "accounting department." In that paragraph there urs the following significant provision:

> "Within all limits fixed by law, the duties and financial responsibilities of the officers and employees charged with the receipt, custody, disbursement, auditing and accounting for funds and property *shall be*

[*] Pages 48-51 of the separately printed appendix hereto.

prescribed in regulations issued by the Governor, with the approval of the President." (Emphasis supplied.)

It is under the authority claimed to have been given to the President by the Act of Congress of August 24, 1912 to issue rules and regulations for the government of the Panama Canal Zone, and under the just quoted Executive Order of the President dated January 27, 1914 and effective April 1, 1914, that it is claimed that there was issued by the Governor of the Panama Canal Zone, circular No. 660-2 dated April 1, 1914, (reprinted in part at pp. 25-27 in the appendix to petitioners' briefs) containing the following provision:

> "For the funds of The Panama Canal, he (the Collector) shall take the Paymaster's receipts; for Canal Zone, money order, postal savings bank, clubhouse, and other trust funds and security deposits, he shall take the draft of the Paymaster on the Treasurer of the United States and shall deposit same in depositaries under the contracts entered into by the Secretary of War. * * * "

Several important points will be noted in connection with this "circular." First, as stated above, the authority for the Governor to make it can rest solely upon the Executive order of the President dated January 27, 1914. As shown by the quotation above from that Executive order, all regulations to be issued by the Governor covering the receipt, custody, disbursement, auditing and accounting for funds and property were to be "within the limits fixed by law" and were to be "prescribed in regulations issued by the Governor, *with the approval of the President.*" In a footnote on page 27 of petitioners' brief, it is stated that "it does not affirmatively appear that this regulation was approved by the President." It is added that "such approval may legitimately be inferred from the promulgation of the set of regulations upon the first day of the Governor's authority under the Executive order of January 27,

1914." Without the President's approval, the circular (called by petitioners a regulation) was ineffective. A complete copy of circular No. 660-2, as obtained from the office of the Panama Canal, Washington, D. C., is printed in the separately printed appendix to this brief at pages 51-55. It speaks for itself. Obviously, it is the Act of the Governor, not of the President. In 1922, there was published a volume entitled Executive Orders Relating to the Panama Canal (March 8, 1904 to December 31, 1921).[10] This publication contains hundreds of orders of Presidents and Secretaries of War covering the smallest details of government activities in the Panama Canal Zone. The documents contained therein even cover office hours for Canal Zone employees. It contains the Executive Order of the President dated January 27, 1914, quoted above, but *nowhere in such volume is there contained the circular dated April 1, 1914, upon which petitioners rely as creating the authority for the securing of the deposits involved in this case.* Similarly, such circular is not included and is not ever referred to in the Canal Zone Code approved June 19, 1934 referred to above, which as stated previously "embraces all the laws relating to or applying in the Canal Zone, except such general laws of the United States as relate to or apply in the Canal Zone."

Neither in form nor content does this circular require the taking of security for deposits in national banks. Certainly it could not have referred to "the contract" entered into by the Secretary of War with the District National Bank because the contract between the Secretary of War and the District National Bank was not made until subsequently, or on August 18, 1914 (R. 2). Certainly it does not comply with the sort of rule or regulation contemplated by the Act of Congress of August 24, 1912 and the Executive Order of the President of January 27, 1914.

[10] The Panama Canal Press, Mount Hope, C. Z., 1922.

And yet, with one exception noted below, every argument by petitioners as to the authorization of the pledge here questioned goes back either to this circular, or to a similar circular issued in 1923 (Governor's Circular No. 660-61), which likewise was not approved by the President. (See page 28 Petitioners' Brief.)

There was no Ratification by Congress.

In the argument below, it was urged that the securing of Panama Canal Zone deposits had been ratified by the Act of Congress of August 24, 1912, c. 390, 37 Stat. 560, and specifically by the following provisions therein:

> "Sec. 2. That all laws, orders, regulations or ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide. The existing courts established in the Canal Zone by Executive order are recognized and confirmed to continue in operation until the courts provided for in this Act shall be established. (Sec. 1309, Title 48 U. S. C.)."

This contention is not made here because obviously an Act of Congress of August 24, 1912, could not ratify and confirm a "circular" issued April 1, 1914.

However, it is urged here that the "practice" of securing Panama Canal Zone deposits was affirmatively confirmed and approved by congressional statute by the following congressional statutes.

Secs. 6 and 7 of the Act of August 21, 1916, c. 371, 39 Stat. 528:

> "Sec. 6. That deposit money orders issued in the Canal Zone in lieu of postal savings certificates in accordance with the rules and regulations heretofore established by the President, or that may hereafter be

established by him shall bear interest at a rate not exceeding two per centum per annum.

"Sec. 7. That the interest received from the Canal Zone money-order funds deposited in banks under Canal Zone regulations shall be available to pay the interest on deposit money orders authorized by the preceding section. Such interest shall also be available to pay any losses which are chargeable to the Canal Zone postal service."

With respect to Sec. 6, the reference therein to the "rules and regulations heretofore established by the President" relating to deposit money orders made no reference to the deposit of money order funds in national banks in the United States or the giving of security for such deposits. The Executive Order of the President referred to was the Executive Order issued by President Wilson September 5, 1914, reading as follows:

"By virtue of the authority vested in me, I hereby establish the following order for the Canal Zone

"Section 1. The Executive Order of September 8, 1911, establishing the Postal Savings System in the Canal Zone, is hereby repealed, *Provided,* That accounts, opened in accordance with that order, and the regulations established thereunder, shall continue as prescribed in said order and regulations until they are finally closed by the withdrawal of deposits.

"Section 2. For the accommodation of persons desiring to deposit their savings in the post offices of the Canal Zone, money orders may be issued in the Canal Zone payable to the purchaser at the office of issue, for which no fee shall be charged.

"Section 3. This order shall take effect from and after October 1, 1914.

"WOODROW WILSON.

"The White House,
5 September 1914."

With respect to Section 7 of the Act of Congress of August 21, 1916, quoted above, it is urged by petitioners that such section constituted ratification of the Governor's circular quoted above dated April 1, 1914. That such section constituted a recognition that money order funds of the Canal Zone *were being deposited* in banks may be admitted. That such section constituted ratification of the securing of Canal Zone money order deposits obviously must be denied. In support of the theory of ratification in this indirect way, petitioners cite *Mason* v. *Tax Commission*, 302 U. S. 186; *Mattingly* v. *District of Columbia*, 97 U. S. 687; *Tiaco* v. *Forbes*, 228 U. S. 549, 556; and *Swayne & Hoyt, Ltd.* v. *U. S.*, 300 U. S. 297.

Mason v. *Tax Commission, supra*, is singularly inapplicable here. That case was whether the United States had acquired exclusive legislative authority over certain territory to be used in connection with the Grand Coulee Dam so as to debar the State from exercising any legislative authority, including its taxing and police power in relation to the property and activities of individuals and corporations within the territory (p. 197). Congress had passed an Act by which it "validated and ratified" all the "contracts and agreements" which had been executed in connection with the Grand Coulee Dam (p. 196). This Court held (at p. 208) that "the deliberate and ratifying action of Congress" gave the force of law to the prior official action even if that action was unauthorized when taken. But in Section 7 of the Act of Congress of August 21, 1916, nothing whatever is said by Congress about ratifying or confirming anything. The most that can be said of such section is that it recognized that Canal Zone officials had been depositing Canal Zone money order funds in banks under regulations.

Mattingly v. *District of Columbia, supra*, is not authority for the position urged by petitioners. The case was one to enjoin assessments for street improvements in the City of Washington. The plaintiff contended that the improvements and assessments were unauthorized and illegal. In

support of the legality of the assessment, there was cited an Act of Congress of June 19, 1878, enacted subsequent to the making of the assessments. That Act preemptorily directed the Commissioners of the District of Columbia to enforce the collection, according to the existing laws, of all assessments for special improvements in respect of which the said assessments were made. It also authorized the Commissioners *to revise* such assessments within thirty days from the passage of the Act and correct the same, so far as the charges were erroneous and excessive. This Court held that such Act was a confirmation of what the Board of Publics Works had done previously. Under such circumstances, this Court held that the assessments in question had been "ratified" by Congress but such a situation does not exist here. Section 7 of the Act of August 21, 1916 merely authorized the use of interest received from the deposit of Canal Zone money order funds.

Tiaco v. *Forbes, supra*, is even less in point. That was a suit for personal damages against the Governor General of the Philippine Islands and others for the alleged illegal deportation of a Chinese person. Immediately after the deportation, the Philippine Legislature passed an Act providing that the action of the Governor General was "approved and ratified and confirmed and in all respects declared legal, and not subject to question or review." Confirming the view urged by Mr. Justice Frankfurter, this Court held that the ratifying act made the action as legal as though the Legislature had previously authorized it. But in that case the ratifying act was specific and unequivocal and left nothing to inference. Here, there is no direct ratification or confirmation whatever, but everything is left to inference.

The only other Act relied upon by petitioners as constituting a ratification of the practice of securing the deposits in question was the Act of September 21, 1922, c. 350, 42 Stat. 1008, Sec. 1324, Title 48, U. S. C., which merely raised the interest rate to three per cent from two per cent

fixed by Sec. 6 of the Act of August 21, 1916, quoted above. It will be recalled that such section 6 of the Act of August 21, 1916, referred specifically to the deposit money orders issued "in accordance with rules and regulations heretofore established by the President" and that such rules and regulations obviously referred to the Executive Order of the President of January 27, 1914, creating the money order system in the Canal Zone, and which made no mention whatever either of the deposit of such money order funds or the securing thereof.

It results, therefore, that the only Act of Congress which purported to give anyone the power to make the sort of rule or regulation which would be required to authorize the securing of Panama Canal Zone funds was the Act of August 24, 1912, that in accordance with such Act, the President issued his Executive Order of January 27, 1914, prescribing that any regulation regarding the custody for funds and property of the Canal Zone must be issued by the Governor, with the approval of the President, that the Governor never issued any regulation specifically requiring the securing of Canal Zone deposits and in any event that the President never approved any regulation whatever on the subject and finally that Congress never in terms ratified or confirmed any action by the President or the Governor on this subject.

POSTAL SAVINGS.

It remains only to consider the Congressional Act of February 16, 1933, 47 Stat. 812, Sec. 1323a, Title 48, U. S. C., also relied on by petitioners as furnishing the requisite authority for exacting the pledge of assets to secure money order deposits.

Unlike the Act of 1912, the Act of February 16, 1933 does not deal with regulations, does not ratify or confirm anything, but simply extends to the Panama Canal Zone such United States Postal Laws "as are not inapplicable to the conditions existing in the Canal Zone." This Act provided:

"Section 1. The Postal Service of the Canal Zone shall be governed by such of the laws, rules, and regulations of the Postal Service of the United States as are not inapplicable to the conditions existing in the Canal Zone, and the Governor of the Panama Canal is authorized to establish new post offices or discontinue those already established, to provide such rules and regulations as are necessary for the operation of the service, to appoint the personnel thereof, and to prescribe the postage stamps and other stamped paper which shall be used in such service: *Provided, however,* That the expenses of operating the Canal Zone Postal Service shall be defrayed, so far as possible, from the revenues derived therefrom, the use of which for that purpose is hereby authorized."

The theory of petitioners is (brief for petitioners p. 41) that by means of this Act, Congress transposed to the Panama Canal Zone the provisions of the Act of Congress of June 25, 1910, c. 386, Sec. 1 et seq., 36 Stat. 814, Sec. 751, 759, Title 39, U. S. C., creating the United States Postal Savings system. Section 751 of that Act created a Board of Trustees for the control, supervision and administration of the Postal Savings System. Section 759 provided that postal savings funds received under such system should be deposited in solvent banks, national or State, should bear certain rates of interest and that "the Board of Trustees shall take from such banks such security in public bonds or other securities, authorized by the Act of Congress or supported by the taxing power, as the Board may prescribe, approve and deem sufficient and necessary to insure the safety and prompt payment of such deposits on demand." Such section then described in detail the method of making the deposits and taking the security, providing for the setting up of a reserve of five per cent, and providing for the investment of surplus funds in United States bonds. The system was by the terms of the Act limited to the Continental United States, the District of Columbia, Alaska and Porto Rico.

App. 55

By an Executive Order dated September 1, 1911, President Taft created a Postal Savings System for the Canal Zone. By Sec. 2 of that order, the President created a Board of Trustees "for the control, supervision and administration of the postal savings depositary offices designated and established under the provisions of this order, and of the fees received as deposit at such postal savings depositary offices by virtue thereof." By Sec. 7 of such order, the President required that postal savings funds received under the order "shall be deposited with the Treasurer of the Canal Zone under such regulations as the Board of Trustees may prescribe." In other words, under this Executive Order, the President duplicated in the Canal Zone the Postal Savings System created the previous year in the United States, *except* that he specifically required the funds arising from such system to be deposited with the Treasurer of the Canal Zone. *Neither in the Executive Order nor in any regulation promulgated thereunder was any provision whatever made for the depositing of such funds in banks or for the securing of such deposits.*

Thereafter, on September 5, 1914, as shown above, President Wilson repealed the Executive Order of President Taft[11] and in Sec. 2 of his repealing Executive Order provided that "For the accommodation of persons desiring to deposit their savings in the post offices of the Canal Zone, money orders may be issued in the Canal Zone payable to the purchaser at the office of issue, for which no fee shall be charged."

It is urged by petitioners that the provisions of the Federal statute for deposit by the Board of Trustees was inapplicable; but that the provisions for taking security were fully applicable to local conditions; and that hence, the Act of Congress of February 16, 1933, authorized the demand of the pledges involved here.

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[11] Page 64 in the separately printed appendix hereto.

On the contrary, the theory of the United States Postal Savings System was just as applicable in the Canal Zone as it was in the United States. With respect to the United States system, Congress in great detail set up a Board of Trustees to safeguard postal savings funds. President Taft set up a similar Board of Trustees in the Canal Zone, but did not see fit to provide for the deposit of Canal Zone postal savings funds in banks, or to require the banks giving security for such deposits. He chose rather to provide that the funds should be deposited with the Treasurer of the Panama Canal Zone. It is obvious that the Postal Savings System in the Canal Zone, which extended only from 1912 to 1914, had nothing to do, by implication or otherwise, with the deposits involved here. On this point, the Court below said (at p. 686):

> "It is significant in this respect that the Act creating the United States Postal Savings System directed and required the Board of Trustees provided for therein to take security from banks in which the postal savings funds were deposited, whereas in the Executive Order creating the Canal system, and in the Act which authorized it there was no similar requirement. The Board was left free to make rules and regulations for the general conduct of the system. So far as appears, no regulation requiring banks to give security for deposits was ever made. The Executive Order itself designated the Treasurer of the Zone as depository or custodian of the funds."

From the foregoing it is seen that there are only two enactments (one the Act of the Isthmian Canal Commission; the other, an Act of Congress) which seek to interpolate United States postal laws as such into the postal laws of the Canal Zone. The first of these, Act No. 8 of the Isthmian Canal Commission (page 16 of Appendix to Petitioners' Briefs) was passed on September 2, 1904, some six years before the United States postal laws contained a postal savings system, and which, therefore, could not incorporate provisions of the United States

Postal Savings System into the postal laws of the Canal Zone. The other enactment is the Act of February 16, 1933 passed by Congress and extending to the Canal Zone such laws of the United States postal service as are not inapplicable to conditions existing there. When this latter Act was passed, the Postal Savings System in the Canal Zone had been repealed for some nine years. So that it is clear that provisions of the United States Postal Savings System were not made applicable to the Panama Canal Zone by the 1933 Act and consequently, not made part of the Canal Zone Postal Laws by such Act.

Furthermore, by the very terms of the Act of February 16, 1933,[12] Congress provided "that all other laws for the operation of the Canal Zone postal service, excepting section 43a of the Penal Code of the Canal Zone, are hereby repealed."

Again, the report to the House of Representatives of its committee on Interstate and Foreign Commerce[13] discussed the purpose of the bill in detail and it is noteworthy that no where in such report, or in the letter of the then Secretary of War quoted in it, was any reference made to the securing of deposits in national banks of Canal Zone postal funds. The committee report stated that "this bill (H. R. 7514) repeals all existing laws of the Canal Zone with reference to the postal service and provides new legislation upon that subject." The only mention in the report of money order funds was reference to the fact that it was intended that "revenues derived from the deposit money order funds" were to be made a part of the general postal revenues. The only possible application, therefore, that this Act could have to the fund involved in this case would be with reference to the sum of $3,535.37, which sum, according to the record (R. 3) was paid to the Secretary of War in addition to the proceeds of the pledged bonds, such sum

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[12] Page 57 of the separately printed appendix hereto.

[13] Report No. 526, 72nd Congress, 1st Session, printed at pages 59-67 of the separately printed appendix hereto.

epresenting accrued interest upon the deposit balances in he District National Bank to and including September 24, 933, when delivery to the then Secretary of War was made.

Even if these Acts be considered as making United States ostal Laws other than those relating to postal savings pplicable to the Canal Zone, the only other provision uthorizing the taking of security for United States postal nds is found in Sec. 90, Title 12, U. S. C. (R. S., Sec. 153) and there was no compliance with that section.

Furthermore, as shown above, Congress with respect to uerto Rico (Sec. 734, Title 48, U. S. C.) adopted a statute lmost identical in terms with the Act of February 16, 1933, elating to the Panama Canal Zone and provided that the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise rovided" shall have the same force and effect in Puerto ico as in the United States and yet, with respect to Puerto ico passed a specific Act that the Treasurer of Puerto Rico hould deposit public funds of that Island in depositary anks and specifically authorized him to require the securng of such deposits. Congress passed no similar Act for anama.

It is manifest, therefore, that petitioners have failed to oint out any Act of Congress which either authorizes the ecretary of War to accept security from a depositary for anal Zone postal funds, or which requires such unauthored depositary to give security for deposit of postal funds f the Canal Zone. There is nothing in the postal laws of he United States or of the Canal Zone which purports to ive legality to the pledge now before this Court and it fols of necessity that the pledge is illegal and void under he principles of law laid down by this Court in the *Potorff* and *Smeeden* cases, *supra*, and followed by the court elow.

Administrative Practice Cannot Supply Lack of Specific Statutory Authority so as to Legalize Pledge.

Having failed to point to any specific authorization for the pledges here in question, petitioners next rely upon what they denote as "the consistent administrative practice." This argument of petitioners states that because officials of the Treasury Department had erroneously assumed that national banks had an inherent power to pledge their assets to secure deposits of public money of the United States, such power must be considered as in fact existing. In view of the decisions of this Court previously referred to, it is quite clear that national banks have no such power and manifestly no administrative practice—no matter how consistent—can create a power where none exists.

In *City of Marion* v. *Sneeden*, 291 U. S. 262, the Court said (at p. 269):

> "In some States national banks had, prior to the 1930 amendment, frequently pledged assets to secure public deposits of the State or of a political subdivision thereof; comptrollers of the currency knew that this was being done; and they assumed that the banks had the power so to do. But the assumption was erroneous. The contention that such power is generally necessary in the business of deposit banking has not been sustained."

In view of Sec. 194 of Title 12, U. S. C., which requires a ratable distribution of an insolvent bank's assets among its creditors, and of Sec. 91 of Title 12, U. S. C., which prohibits and declares void preferential transfers of a bank's assets in contemplation of insolvency, it cannot be argued that any custom or usage could legalize this pledge.

On this point, this Court said in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, 255:

> "To permit the pledge would be inconsistent with many provisions of the National Bank Act which are designed to ensure, in case of disaster, uniformity in

the treatment of depositors and a ratable distribution of assets. Compare *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 290."

This question of custom and usage has been consistently sserted as a defense and uniformly overruled in various ircuit court opinions, as to which this Court has con-istently denied certiorari.

Leonard v. *Gage*, 94 F. (2d) 19, 26, C. C. A. 4th Cir., cert. denied, 303 U. S. 653;
O'Connor v. *Rhodes*, 79 F. (2d) 146, 151 (App. D. C.), cert. denied, 296 U. S. 568;
City of Fort Worth v. *McCamey*, 93 F. (2d) 964, 968, C. C. A. 5th Cir., cert. denied, 304 U. S. 571;
City of Chicago v. *Joseph*, 95 F. (2d) 444, 446, C. C. A. 7th Cir., cert. denied, 304 U. S. 578;
Hood v. *Hardesty*, 94 F. (2d) 26, 29, C. C. A. 4th Cir., cert. denied, 303 U. S. 661;
Granzow v. *The Village of Lyons*, 89 F. (2d) 83, 85, C. C. A. 7th Cir.

Indeed the main document relied upon by petitioners as tablishing the "consistent administrative practice" is t forth on pages 42-45 of the brief in No. 6, and is an tract from a memorandum which accompanied a bill ich the Treasury Department sought to have enacted as amendment to Sec. 90 of Title 12, U. S. C. The bill was ver enacted by Congress and the memorandum would em to be of little value.

However, it should be noted that while the memorandum dicates that the Treasury Department may have assumed at national banks had the power to pledge assets to se-re deposits of federal funds, it also definitely shows that a result of the *Pottorff* and *Sneeden* cases, the Trea-ry officials realized that their assumption was erroneous d that no such power in fact existed. Thus, part of the morandum (p. 43 of petitioners' brief in No. 6) in re-ring to the *Sneeden* and *Pottorff* cases, states:

> "The court took the position that national banks have no implied power to give security for deposits of public money, notwithstanding the fact that for more than 60 years national banks have been giving such security with the approval of the Comptroller of the Currency."

As realized by the Treasury officials, the decisions in the *Pottorff* and *Sneeden* cases definitely clarified any doubt that might have existed as to the National Bank Act having conferred an implied power upon national banks to pledge assets.

Since these decisions there is no longer any question of the absence of such power and consequently, there is no basis for looking to administrative construction as a method of construing an ambiguous statute. No ambiguity exists, unless this Court's decisions are to be ignored, nor do any of the cases cited by petitioners support the proposition that where a power has been held not to exist, administrative practice—no matter how long continued—can create such power.

In *U. S. v. Midwest Oil Co.*, 236 U. S. 459, the case principally relied upon by petitioners in this connection, the rule is clearly announced that custom and usage cannot create a power when none exists, but at best may raise a presumption that such power exists. As was said by the Court (at p. 474):

> "Nor do these decisions mean that the Executive can, by his course of action, create a power."

The case of *Berger* v. *Chase National Bank*, C. C. A. 2d, decided July 24, 1939, is not in point. In the *Berger* case, the Circuit Court of Appeals for the 2d Circuit clearly went beyond the doctrine in the *Pottorff*, *Sneeden* and *Lewis* cases in holding that authority to pledge assets could be derived from a territorial enactment which Congress had continued in force in the Philippine Islands. In this aspect, we think it is clear the decision in the *Berger* case is erroneous,

since there was no Act of Congress which specifically authorized the securing of the deposits of the Government of the Philippine Islands.

However, the *Berger* case is distinguishable from the instant case. In the *Berger* case, Congress had authorized the Philippine Commission to enact laws respecting the government of the Philippine Islands, and incident thereto, the Philippine Commission specifically enacted that the Secretary of War of the United States might designate banking institutions in the United States as depositaries of the government of the Philippine Islands and to exact bonds from said banks as security for the repayment of Philippine deposits.

This enactment remained in full force and effect until 1916, when the third Philippine Legislature adopted a similar provision of designation of depositaries and the requirement of the exaction of security for deposits made thereunder, and this provision was subsequently included in Section 625 of the Philippine Administrative Code of 1917.

The Court held that the delegation of power by Congress, coupled with the express legislative acts, and the subsequent congressional enactment known as the Autonomy Act of 1916, which provided that "the laws in force in the Philippines on August 29, 1916, shall continue in force and effect, except as altered, amended, or modified by this chapter, until altered, amended, or repealed by the legislative authority provided by this chapter or by Acts of Congress of the United States," constituted authorization and validity of the pledge to secure Philippine Island deposits.

In the instant case, there is neither a specific regulation authorizing or requiring the exaction of security, nor is there an Act of Congress in existence which may be said to ratify any such attempted regulation.

II.

THE TRIAL COURT HAD JURISDICTION.

Before discussing the doctrine of sovereign immunity to suit of the United States and whether such doctrine applies here, it will clarify the issue to show the legal status of the fund sought to be recovered.

A. The attempted pledge of the bank's assets to secure Canal Zone deposits in the absence of express statutory authority was void, and no title to said assets passed thereby to the intended pledgee.

It has been demonstrated under Point I that (1) national banks derive their powers from Congress and powers not granted are denied; (2) that authority to pledge their assets must be by specific Act of Congress; (3) that no Act of Congress authorized the bank to effect the pledge or required the depositing officer to exact it; (4) that no general or incidental power is vested in national banks to pledge their assets to secure government or other deposits, and that each Act of Congress authorizing or requiring such pledges has by its terms been expressly limited to the deposits therein described.

It is now definitely settled that unauthorized pledges by national banks are illegal and void because *ultra vires,* and that the intended pledgees acquired no title or right in the securities, which always remain assets of the bank. These principles are clearly enunciated in the following cases:

Central Transportation Company v. *Pullman's Palace Car,* 139 U. S. 24;
Texas & Pacific Ry. Co. v. *Pottorff,* 291 U. S. 245;
LaParr v. *City of Rockford* (C. C. A. 7), 100 Fed. (2d) 564, 569, cert. den. May 1, 1939;
Hood v. *Hardesty,* (C. C. A. 4), 94 F. (2d) 26, 29, cert. den. 301 U. S. 361;
Redfield Independent School District v. *Schnetzer,* (C. C. A. 8), 94 F. (2d) 257, 258;

City of Ft. Worth v. *McCamey,* (C. C. A. 5), 93 F. (2d) 964, 967, cert. den. 304 U. S. 571;
Queenan v. *Mays,* (C. C. A. 10), 90 F. (2d) 525, 533, cert. den. 302 U. S. 724;
Leonard v. *Gage,* (C. C. A. 4), 94 F. (2d) 19, 23, 24, cert. den. 303 U. S. 653;
City of Chicago v. *Joseph* (C. C. A. 7), 95 F. (2d) 444, 446, 447, cert. den. 304 U. S. 578;
The Illinois Central Ry. Co. v. *Rawlings* (C. C. A. 5), 66 F. (2d) 146, cert. den. 291 U. S. 668;
Baltimore and Ohio Ry. Co. v. *Smith* (C. C. A. 3), 56 F. (2d) 799.
Downey v. *City of Yonkers* (C. C. A. 2) Aug 3, 1939.

This Court in *Texas & Pacific Ry. Co.* v. *Pottorff, supra,* on these questions said (at p. 260):

> "It is the settled doctrine of this Court that no rights arise on an *ultra vires* contract, even though the contract has been performed; and that this conclusion cannot be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised. *California Bank* v. *Kennedy,* 167 U. S. 362; *McCormick* v. *Market Bank,* 165 U. S. 538; *Central Transportation Co.* v. *Pullman Co.,* 139 U. S. 24."

The *Pottorff* case related to the powers of a national bank, and on the principles of law involved, this Court cited with approval the case of *Central Transportation Co.* v. *Pullman Co., supra,* which laid down the fundamental doctrine here contended for by the respondents (at pp. 59 and 60):

> "A contract of a corporation, which is *ultra vires,* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, *is not voidable only, but wholly void, and of no legal effect.* The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. *No performance on either*

side can give the unlawful contract any validity, or be the foundation of any right of action upon it." (Italics supplied.)

The doctrine is well illustrated in the decision of *Illinois Central R. R. Co.* v. *Rawlings* (C. C. A. 5), 66 F. (2d) 146, cert. den. 291 U. S. 668, wherein that Court, considering the nature of an *ultra vires* pledge, stated (at page 149):

"* * * By the Pottorff Case it was meant to decide, and it was decided, that such an arrangement, looking to creating, in the event of insolvency, preferences among general depositors, was fundamentally invalid; that no rights could be predicated on it, or on the physical possession of the pledged bonds acquired by virtue of it. * * *"

So, in *Baltimore and Ohio Ry. Co.* v. *Smith, supra,* in referring to an attempted pledge of a national bank's assets to secure a deposit, the Court said, at page 802:

"Such a contract is not only voidable but wholly void and of no legal effect."

The Circuit Court of Appeals for the 7th Circuit reached the same conclusion in *City of Chicago* v. *Joseph, supra,* wherein it was stated (at page 446):

"If we are permitted to accept the averment that the securities were those of the bank and that defendant was so advised, the pledge was invalid, and, as we said, in the last mentioned case, 'being void the transaction could not be confirmed, ratified, enforced or rendered enforceable by the application of any doctrine of estoppel or otherwise. (Citing cases) This is because, not merely that the bank ought not to make the contract, but that it could not legally make it. Ratification is impossible if there is no power to contract. (Citing cases) And knowledge of the lack of existence of authority is conclusively presumed.'"

In *LaParr* v. *City of Rockford, supra,* where it was shown no statutory authority exists for the pledge, the Court held (at p. 567):

> "It follows, therefore, that the pledge of the assets was illegal. * * * All of the parties assumed that the pledge was valid. Their assumption was incorrect, but that it was erroneous was not authoritatively established by the Supreme Court until after the payment of the deposit to the city. Immaterial, however, is the motive that inspired the parties, for, under the law, the pledge was invalid, and no act of the bank, the receiver or the comptroller could validate it."

B. An unauthorized pledge of a national bank's assets being void, the Receiver is entitled to recover the pledged property or the proceeds thereof.

The point directly involved in *Marion* v. *Sneeden, supra,* was whether bonds having been delivered under the void pledge agreement, the Receiver could recover them. This Court decided the Receiver could recover the bonds.

The same rule applies to the proceeds of the bonds if they have been sold. The rule was well stated in *Leonard* v. *Gage, supra,* (cert. denied) where it was stated (at p. 24):

> "And we think it clear that the proceeds of the collateral applied in extinguishment of the deposit accounts can be recovered for another reason. To permit the receivers of the failed national bank to thus apply their assets on unsecured claims would be to sanction the violation of the statutes forbidding preferences and requiring the equal and ratable distribution of the assets. See 12 U. S. C. A., sections 91, 194; Illinois Cent. R. Co. v. Rawlings, 5 Cir., 66 F. 2d 146, 149; Adams v. Cribbis, D. C. 17 F. Supp. 723."

Hood v. *Hardesty,* 94 F. (2d) 26 (cert. den. 301 U. S. 361) was a suit to recover the proceeds of bonds which had been sold, such bonds having been pledged by a national bank to secure what the court found was a void

pledge. The Court in an opinion by Parker, J. said (at p. 29):

> "On the second question, the position of defendant is that there was a voluntary payment of defendant's deposit under mistake of law, and that payment so made cannot be recovered. There are two answers to this; first that the receiver of a national bank is an administrative officer of the United States and is not bound by the rule precluding the recovery of money voluntarily paid under mistake of law; second, that to permit the assets of the failed national bank to be thus applied in extinguishment of unsecured claims for deposits would contravene the federal statutes forbidding preferences to creditors and requiring the equal and ratable distribution of assets. 12 U. S. C. secs. 91 and 194. This matter has been fully discussed in the case of Leonard et al. v. Gage & Elliott, 4 Cir., 94 F. 2d 19, this day decided, and what is there said need not be here repeated."

The Receiver may recover, even though he has consented to the sale of the pledged property with the express approval of the Comptroller of the Currency, *LaParr* v. *City of Rockford, supra; O'Connor* v. *Rhodes,* 79 F. (2d) 146, 153; or even with the express approval of the Court, *Redfield Independent School District* v. *Schnetzer, supra,* and notwithstanding the fact that when the pledge was made, the Comptroller of the Currency ruled that it was valid, *Leonard* v. *Gage, supra.*

C. The fund sought to be recovered has not been covered into the Treasury of the United States, is not part of the revenue of the United States, and is not public money of the United States.

A clear distinction should be made between the money originally deposited through the Secretary of War in the District National Bank on the one hand, and on the other, the fund now sought to be recovered by respondent.

The questions of what official made the original deposits in the District National Bank, whether or not those deposits were public moneys of the United States, and the related questions discussed in Part I of this brief, all have to do with the problem of whether the pledge itself was valid. An entirely separate question is presented with respect to the fund now sought to be recovered by respondent.

It is admitted by petitioner (R. 13) that the fund sought to be recovered represents the proceeds of the bonds formerly belonging to the District National Bank and pledged to secure the deposit in the bank.

It follows, as shown just above, that if the pledge was, as respondent contends, "wholly void and of no legal effect" (*Central Transportation Company* v. *Pullman's Palace Car,* 139 U. S. 24), then no title to such fund passed to the Secretary of War by the transfer of such fund to him because such a void contract cannot "be the foundation of any right of action upon it." (*Central Transportation Co.* v. *Pullman's Palace Car, supra.*)

This distinction is well illustrated in *O'Connor* v. *Rhodes, supra,* where the Court of Appeals, after first discussing the fund composed of deposits made by the Alien Property Custodian in the Commercial National Bank of Washington, differentiated between such deposits, and the proceeds of the bank's bonds pledged to secure the original deposits by saying (at p. 152):

> "On the other hand, the excess which the bill charges the Alien Property Custodian received over and above other general creditors of the bank was a part of the trust assets of the insolvent bank. *It was, therefore, money of the bank* out of which all creditors were entitled to be paid ratably. If it was improvidently paid to the Custodian, it is recoverable, * * * and the resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States." (Emphasis supplied.)

(The contrary result with respect to the same fund was reached in *Cummings* v. *Hardee,* 102 F. (2d) 622, but upon the ground that the money had been covered into the U. S. Treasury.)

In this case involving the District National Bank, the pledged bonds were sold and the proceeds admittedly deposited in the Hamilton National Bank of Washington.

It is not even contended by petitioners that the fund sought here to be recovered has been covered into the Treasury of the United States.

Inasmuch, therefore, as this action is brought to recover the assets of the bank, and since the United States has not obtained any interest in such assets, neither the United States nor the Panama Canal is an indispensable party to this action. This conclusion is predicated upon a careful consideration of this question by this Court in the following cases:

U. S. v. *Lee,* 106 U. S. 196, 213, 215;
Osborn v. Bank of the United States, 9 Wheat. 738;
Tindal v. *Wesley,* 167 U. S. 204, 223;
Philadelphia Co. v. *Stimson,* 223 U. S. 605, 619;
Ex parte Ayers, 123 U. S. 443, 500;
Allen v. *B. & O. Ry. Co.,* 114 U. S. 311, 315;
Poindexter v. *Greenhow,* 114 U. S. 270, 288, 289;
Scott v. *Donald,* 165 U. S. 58, 70;
Ickes v. *Fox,* 300 U. S. 82, 87, 88;
U. S. v. *Peters,* 5 Cranch (9) 115, 139, 140.

Respondent contends that the purported pledge of the bank's assets to the Secretary of War was *ultra vires* and void and passed no interest in the securities to the intended pledgee and since the intended pledgee acquired no right or interest in the bank's pledged bonds, or the proceeds thereof, neither the United States nor the Canal Zone is an indispensable party herein.

Petitioners' defense to this phase of the argument is predicated upon the asserted interest of the United States in the proceeds of the pledged bonds and they contend that

the mere assertion of this interest is sufficient to preclude this Court from examining the merits of the case.

It is clear that to preclude this Court's jurisdiction and to cause the action to be dismissed as one really against the sovereign, the petitioners must show affirmatively that the United States has some valid interest (as distinguished from a mere assertion of interest) in the property and unless they can make good their assertion of valid interest in the United States, respondent is entitled to recover his property unlawfully held by these petitioners.

In *Osborn, et al.* v. *Bank of the United States, supra,* in which Osborn, the Auditor of the State of Ohio, acting pursuant to the State statute obtained and delivered to his successor in office $100,000. from the Bank of the United States as the amount of a tax assessed by the State, the defendants urged that they held the money solely as officers of the State of Ohio, the owner thereof, and that "the court ought not to proceed without making the state a party," and if that could not be done, that the court should not take jurisdiction of the cause (p. 846). Chief Justice Marshall overruled the objection in the following language (at p. 846):

> "The full pressure of this argument is felt and the difficulties it presents are acknowledged. The direct interest of the State in the suit, as brought, is admitted; and, had it been in the power of the bank to make it a party, perhaps no decree ought to have been pronounced in the cause, until the State was before the court. But this was not in the power of the bank. * * * "

The Chief Justice in holding further that, inasmuch as the statute of Ohio was unconstitutional and void, *no party could obtain any right thereunder, and relief should be given in the case without making the State of Ohio a party,* said (pp. 858-9):

> "But, it has been shown, we think, that an action of detinue might be maintained for that article, if

the bank has possessed the means of describing it, and that the interest of the State would not have been an obstacle to the suit of the bank against the individual in possession of it. The judgment in such a suit might have been enforced, had the article been found in possession of the individual defendant. It has been shown that the danger of its being parted with, of its being lost to the plaintiff, and the necessity of a discovery, justified the application to a court of equity. It was in a court of equity alone that the relief would be real, substantial and effective.

"It was proper then, to make a decree against the defendants in the Circuit Court, if the law of the State of Ohio be repugnant to the constitution, or to a law of the United States made in pursuance thereof, so as to furnish no authority *to those who took, or to those who received, the money for which this suit was instituted.*" (Emphasis supplied.)

It is said by petitioners here (petitioners' brief, footnote, p. 45) that the *Osborn* case has since been modified, but the fact is that the only part modified was the holding that the fact that the United States was not a party to the record was a sufficient ground for holding the suit could proceed without it. The basic principle permitting recovery has not been modified.

The decision of Chief Justice Marshall in *Osborn* v. *Bank of the United States, supra,* and the principles enunciated in that case have been reaffirmed by the Supreme Court of the United States in subsequent cases.

In *Scott* v. *Donald,* 165 U. S. 58, 67-70, this Court held:

"A preliminary question is raised by the proposition that these are in fact suits against the State of South Carolina, and forbidden by the Eleventh Amendment. This question is sufficiently disposed of by referring to the late case of *Re Tyler,* 149 U. S. 164 (37:689), where the conclusion of numerous previous cases was stated to be that where a suit is brought against defendants who claim to act as officers of a State, and, under color of an unconstitutional statute, commit acts of wrong

and injury to the property of the plaintiff, *to recover money or property in their hands unlawfully taken by them* in behalf of the State, or for compensation for damages, such suit is not within the meaning of the amendment, an action against the State." (Emphasis supplied.)

In *United States* v. *Lee, supra,* this Court in holding that a plea of sovereign immunity on behalf of the United States was not well taken, and that the United States was not an indispensable party, said (at p. 210):

"The case before us is a suit against Strong and Kaufman as individuals, to recover possession of property. The suggestion was made that it was the property of the United States, and that the court, without inquiring into the truth of this suggestion, should proceed no further; and in this case, as in that, after a judicial inquiry had made it clear that the property belonged to plaintiff, and not to the United States, we are still asked to forbid the court below to proceed further; and to reverse and set aside what it has done, and thus refuse to perform the duty of deciding suits properly brought before us by citizens of the United States."

D. The doctrine of sovereign immunity does not apply.

Before proceeding with the broad aspects of this question, it will be helpful to mention certain analogies between the form of the action here and the form of the action involved in *Osborn, et al.* v. *The Bank of the United States,* 9 Wheat. 738. The *Osborn* case was in the form of a bill in equity. Although the State of Ohio was claimed by defendants to be the real party in interest, the State was not named as a defendant. That the State claimed an interest in the money was admitted, but it was asserted that such claim was not valid. The chief prayer of the bill of complaint was that a fund of money be restored to plaintiff who claimed he was the real owner. Among the defendants was one Sullivan, who had played no part in obtaining the money, but who only held it as a successor to a former trea-

surer. Sullivan at the time of the suit was Treasurer of the State of Ohio. He had no personal interest in the fund. *If possession of personal property constitutes title, then Sullivan, Treasurer of the State of Ohio, had title.* The bill prayed that the former Treasurer Curry, the then Treasurer Sullivan and Osborn, The Collector of Taxes, "in their official and private characters," may be made defendants; "that they may make discovery and may be enjoined from using or paying away the coin or notes taken from the bank, *may be decreed to restore the same,* and may be enjoined from proceeding further under the said act." The answer of Sullivan averred that the money "has remained in his hands as treasurer, and not otherwise." The trial court pronounced a decree directing the defendants to restore to the bank the sum of $100,000. with interest on $18,830., the amount in the hands of Sullivan. The Supreme Court affirmed the decree, except as to the provision for interest, as to which it reversed.

The present suit is in the form of a bill in equity. The petitioners are sued both in their individual and official capacities (R. 2). The United States is not made a party defendant. The chief purpose of the suit is to recover proceeds of bonds constituting assets of the bank and illegally pledged, which were received by petitioners' predecessors in office illegally and under a mistake of law, and now held by and under the control of petitioners. The chief prayer is that the petitioners be required to account to respondent for the sum in question less dividends paid to general creditors, with interest. The answers of petitioners averred that they did not hold the moneys in question personally but in their official capacities. The judgment of the trial court, which in form was consented to by petitioners, was for the payment of the fund in question to respondent, less dividends paid to other general creditors, plus interest.

Petitioners seek to distinguish the *Osborn* case upon the ground that the predecessor of the state treasurer, Sullivan, had obtained the money in violation of a court in-

junction. That point, however, went to the legality of the holding of the predecessor state official. It remained true that the successor treasurer, Sullivan, actually had possession of the property and held it solely in his capacity as a state official and that the State asserted that his possession was legal. Petitioners' position is that the mere holding of a fund by an official under a claim of right and under an asserted interest of the State in the fund is sufficient to make the State an indispensable party and to permit the invocation of the doctrine of sovereign immunity. In the *Osborn* case, this Court held to the contrary.

Petitioners in discussing the various cases on this subject seek to set up distinctions between cases against public officers in which suit will lie and others in which suit will not lie. One of the chief distinctions thus sought to be made by petitioners is the question of whether the property sought to be recovered is in the possession of the official who originally obtained it, or in the possession of a successor in office. It is submitted that this distinction is not a sound one. In this connection, there are several points of importance in *United States* v. *Lee, supra.*

Frederick Kaufman and Richard P. Strong, the only remaining defendants in the *Lee* case when it reached this Court, were sued individually but they had no personal interest in the outcome of the suit and were sued only because they were in possession of the property. Kaufman was the superintendant employed by the Secretary of War to take charge of what is now the Arlington National Cemetery, and Strong was a United States Army officer, also acting under instructions of the Secretary of War, who was in possession of the remainder of the property. Further, the record on appeal in the *Lee* case shows that at the time the suit was brought, the property in question had been in the possession of the United States through its officers *"for more than ten years,"* 106 U. S. 198. While it does not appear affirmatively that other officers had not been in possession previously, such conclusion may be reasonably, if not conclusively, inferred. In any event, Kaufman and Strong

were not sued as the persons who had obtained possession of the property originally; they were sued as the officers of the government who were in possession when the suit was brought.

Furthermore, the record on appeal contains the text of a "tax sale certificate" signed by President Abraham Lincoln and bearing the notation that it had been recorded in the appropriate county in Virginia.[14] The effect of such tax sale certificate was unquestionably that at the time the suit was filed, at least a bare legal title to the property in question rested in the government of the United States. Such certificate was to be taken as *prima facie* evidence of the regularity and validity of the sale, and "of the title of the said purchaser or purchasers under the same." 106 U. S. 200. It results that while, as stressed so strongly by petitioners, the *Lee* case was in form an action in ejectment to oust Kaufman and Strong from possession, the result of the suit was to take the title of the property from the United States Government.

The next distinction sought to be made by petitioners relates to the form of the action. Petitioners in particular stress that this suit was brought in equity and seek to impress a constructive trust upon the property involved. Upon this basis chiefly, they seek to distinguish *United States* v. *Lee, supra,* on the ground that the *Lee* case was an action at law in the form of a suit in ejectment.

Even in its strict sense, the action of ejectment is a possessory one, *Cincinnati* v. *White,* 6 Pet. 431, 441, 442. The issue in a suit of ejectment, however, may rest either upon the question of possession alone or upon the question of title, *Smith* v. *McCann,* 24 How. 398, or upon both, subject of course, to statutory modifications. The original common law action of ejectment has been very largely changed by statute and in some states the statutes have merely abolished fictitious proceedings leaving the action in other respects as at common law, *Miles* v. *Caldwell,* 2 Wall. 35.

[14] This certificate is printed in full at pages 67-70 of the separately printed appendix to this brief.

Stanley v. *Schwalby*, 162 U. S. 258, was an action of trespass, but that was solely because (p. 271) under the laws of Texas, a judgment for the plaintiff in an action of trespass was not restricted to possession but might be for title also. In other words, at that time in Texas, the action of trespass was the equivalent of an action in other jurisdictions to quiet title. Even more important, the Texas statute involved provided (p. 271) that the judgment in such an action "shall be *conclusive as to the title* or right of possession established in such action, upon the party against whom it is recovered. * * * " It was upon the basis of that provision of that statute alone that this Court held the State to be an indispensable party.

But the technical distinctions between an action at law of ejectment and for example, an action in equity to quiet title, are not here important, because, as stated by this Court in the *Lee* case, the United States would not be precluded by a final judgment, but if it felt itself aggrieved, could bring an action. On this point in the *Lee* case, this Court said (at p. 222):

> "Hence, taking the present case as an illustration, the United States may proceed by a bill in chancery, to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained. *Or it may bring an action of ejectment, in which, on a direct issue between the United States as plaintiff and the present plaintiff as defendant, the title of the United States may be judicially determined.* Or, if satisfied that its title has been shown to be invalid, and it still desires to use the property or any part of it, for the purposes to which it is now devoted, it may purchase such property by fair negotiation, or condemn it by a judicial proceeding, in which a just compensation shall be ascertained and paid, according to the Constitution." (Emphasis supplied.)

As a result of the *Lee* case, the United States chose the of the last mentioned alternatives. The trial court rded possession to the property to the plaintiff Lee

and ousted the defendants, officers and agents of the United States, from possession. But in doing so, the Court distinctly passed upon the question of title, found title of plaintiff to be good and that of the United States to be bad.

It follows that while in form the action was merely one of ejectment, nevertheless the question of the validity of the title of the United States was expressly decided by this Court. The United States then proceeded to purchase the property by negotiation.

In *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U. S. 381, objection was made that an agency of the United States (Regional Agricultural Credit Corporation) could not be sued "in tort," because suits against the United States sounding in tort were not authorized in the Court of Claims Act. But this Court refused to entertain such a fictional defense, saying (at page 395):

> "To be sure, the common law fiction of waiving the tort and suing in assumpsit cannot be used as an evasion of the limited liability created by the Court of Claims Acts. (Citing cases) But where the wrong really derives from an undertaking, to stand on the undertaking and to disregard the tort is not to invoke a fictive agreement. It merely recognizes a choice of procedural vindications open to the injured party."

Such procedural distinctions are particularly inappropriate now since the Federal Rules of Civil Procedure promulgated by this Court abolished the previous distinctions between suits at law and actions in equity and under which, by Rule 86, such rules "govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the Court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies."

Furthermore, regardless of the technicalities of pleading, the same contentions made by petitioners in the instant case were also made by the United States officers in the *Lee* case as shown in the following statement of that case by the Court (at p. 204):

> "The counsel for plaintiffs in error and in behalf of the United States assert the proposition, that though it has been ascertained by the verdict of the jury, in which no error is found, *that the plaintiff has the title to the land in controversy, and that what is set up in behalf of the United States is no title at all, the court can render no judgment in favor of the plaintiff against the defendants in the action, because the latter hold the property as officers and agents of the United States, and it is appropriated to lawful public uses.*" (Emphasis supplied.)

Furthermore, it will be recalled that this Court in the *Lee* case said (at p. 208):

> "When he (a citizen), in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him, for the protection and enforcement of that right."

E. The doctrine of sovereign immunity.

The immunity from suit of the States (involved in the *Osborn* case and numerous of the cases cited by petitioners) being derived from the Constitution itself, that immunity may be broader than that of the United States because the latter, being "derived by implication," has been modified both by enactment and judicial construction.

That there exists a tendency in the American government towards "confining" the doctrine of the immunity of the United States from suit has been most recently emphasized in *Keifer & Keifer* v. *Reconstruction Finance*

Corporation, supra, wherein this Court said (at pages 388, 389):

> "The starting point of inquiry is the immunity from unconsented suit of the government itself. As to the states, legal irresponsibility was written into the Eleventh Amendment; as to the United States, it is derived by implication. Monaco v. Mississippi, 292 U. S. 313, 321. For present purposes it is academic to consider whether this exceptional freedom from legal responsibility rests on the theory that the United States is deemed the institutional descendant of the Crown, enjoying its immunity but not its historic prerogatives, cf. Langford v. United States, 101 U. S. 341, 343, or on a metaphysical doctrine 'that there can be no legal right as against the authority that makes the law on which the right depends.' Kawananakoa v. Polyblank, 205 U. S. 349, 353. But because the doctrine gives the government a privileged position, it has been appropriately confined.
>
> "Therefore, the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work. United States v. Lee, 106 U. S. 196, 213, 221, Sloan Shipyards Corp. v. Fleet Corp., 258 U. S. 549, 567."

Many general classifications distinguishing between the class of cases where jurisdiction has been sustained and other classes where the suit has been dismissed on the ground of sovereign immunity appear in the opinions of this Court. The one most frequently quoted was contained in *Pennoyer* v. *McConnaughy,* 140 U. S. 1, 10:

> "The first class is where the suit is brought against the officers of the State, as representing the State's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. *Re Ayers,* 123 U. S. 443; *Louisiana* v. *Jumel,* 107 U. S. 711; *Antoni* v. *Greenhow,* 107 U. S.

769; *Cunningham* v. *Macon & B. R. Co.*, 109 U. S. 446, *Hagood* v. *Southern*, 117 U. S. 52.

"The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. Such suit, whether *brought to recover money or property in the hands of such defendants*, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy "at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain legal duty, purely ministerial, is not within the meaning of the Eleventh Amendment an action against the State. *Osborn* v. *Bank of United States*, 9 Wheat, 738; *Davis* v. *Gray*, 16 Wall. 203; *Tomlinson* v. *Branch*, 15 Wall. 460; *Litchfield* v. *Webster County*, 101 U. S. 773; *Allen* v. *Baltimore & O. R. Co.*, 114 U. S. 311; *Louisiana Board of Liquidation* v. *McComb*, 92 U. S. 531; *Poindexter* v. *Greenhow*, 114 U. S. 270." (Emphasis supplied.)

Such classifications, however, like efforts to reduce to rules of thumb such broad subjects of judicial review as the separation of powers, the delegation of power and the limits of the Federal Government under the Commerce Clause and of the police power of the States are not fixed nor rigid, and always must take into account the facts of the case and current congressional policy.

It becomes important, then, to seek a classification going to the heart of the problem rather than to non-essentials. The classification of the limits of the effective application of the doctrine of soverign immunity, which seems to have been uniformly followed subsequently, is contained in the following statement by this Court in *United States* v. *Lee, supra*, (at p. 207):

"On the other hand, while acceding to the general proposition that in no court can the United States be

sued directly by original process as a defendant, there is abundant evidence in the decisions of this court that the doctrine, if not absolutely limited to cases in which the United States are made defendants by name, is not permitted to interfere with the judicial enforcement of the established rights of plaintiffs, when the United States is not a defendant or *a necessary party to the suit.*" (Emphasis supplied.)

Fundamentally, in seeking to apply general rules as to necessary parties to the case at bar, the chief reliance of petitioners is upon the contention that since individuals made deposits with the Panama Canal government through purchasing money orders, since the *original deposits* in the bank consisted of money order funds and since the United States government is at least morally obligated to pay such money orders, therefore, the interests of the United States are directly involved and hence, it is an indispensable party to this suit.

But is this contention sound?

It might be sound if there were involved here the original deposits made in the District National bank.

But the fund involved here stands in an entirely different category. As shown above, this fund is derived solely from the bonds of the District National bank illegally pledged as collateral to the original deposit. If the pledge was illegal and absolutely void, and, as this Court held in *Pullman's Palace Car Company* case, such a void pledge vests no right or interest in the pledgee, then it follows that neither the United States Government nor anyone else obtained any right or interest in the pledged securities or the proceeds thereof. If the United States obtained no interest, then it is not an indispensable party.

The essential point of the case at bar is that it is a suit to recover possession of proceeds of pledged assets which unquestionably belonged to the District National bank, and which the predecessors of petitioners obtained wrongfully (in a legal sense) and which petitioners are wrongfully withholding.

The wrongful nature of the taking and withholding stems from the fact that the pledges were void and that petitioners and their predecessors took and now hold with imputed knowledge that the pledged bonds (and hence their proceeds) were owned by respondent for the benefit of the creditors (and stockholders, if the creditors are paid in full) of respondent's bank. In respondent's view of the matter, it makes no difference that such taking and withholding was altogether innocent.

In consequence of the narrowness of the issue thus presented, the only cases dealing with sovereign immunity and necessary parties are those cases which turn on the taking or withholding by government officers of another's property. Such cases decided by this Court are not numerous. The leading cases of *Osborn* v. *Bank of the United States,* and *Lee* v. *United States,* have already been discussed.

Cunningham v. *Macon and Brunswick Railroad Company, et al.,* 109 U. S. 446, did not fall within this category but a discussion by the Court, while probably *dictum,* is interesting and enlightening. At page 452, this Court said:

> "It has been held in a class of cases where property of the State, or property in which the State has an interest, comes before the court and under its control, in the regular course of judicial administration, without being forcibly taken from the possession of the government, the court will proceed to discharge its duty in regard to that property. And the State, if it choose to come in as plaintiff, as in prize cases, or to intervene in other cases when she may have a lien or other claim on the property, will be permitted to do so, but subject to the rule that her rights will receive the same consideration as any other party interested in the matter, and be subjected in like manner to the judgment of the court. Of this class are the cases of *The Siren,* 7 Wall. 157; *The Davis,* 10 Wall. 20, and *Clark* v. *Barnard, et al.,* 108 U. S. 436."

Further (at p. 452) the Court said:

> "Another class of cases is where an individual is sued in tort for some act injurious to another in regard

to person or property, to which his defense is that he has acted under the orders of the government.

"In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction, because he *asserts* authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him. See, *Mitchell* v. *Harmony*, 13 How. 115; *Bates* v. *Clark*, 95 U. S. 204; *Meigs* v. *McClung*, 9 Cranch 11; *Wilcox* v. *Jackson*, 13 Pet. 498; *Brown* v. *Huger*, 21 How. 305; *Grisar* v. *McDowell*, 6 Wall. 363.

"To this class belongs also the recent case of *U. S.* v. *Lee*, 106 U. S. 196, for the action of ejectment in that case is, in its essential character, an action of trespass, with the power in the court to restore the possession to the plaintiff as part of the judgment. And the defendants, Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this court held to be unlawful and, therefore, insufficient as a defense. The judgment in that case did not conclude the United States, as the opinion carefully stated, but held the officers liable as unauthorized trespassers, and turned them out of their unlawful possession."

The Governor of Georgia v. *Sundry African Slaves, Madrazo, claimant*, 1 Pet. 110, involved an effort to regain property claimed to have been wrongfully seized by the State of Georgia, but in its essentials the decision turned upon the point that the money sought to be recovered had actually been covered into the State Treasury and it was largely upon this ground that the Court held it to be in effect a suit against the State.

Louisiana v. *Jumel*, 107 U. S. 711, was totally different in nature from the suit at bar. It did not involve the attempted recovery of a fund and in addition, the money involved had actually been put into the State Treasury.

Poindexter v. *Greenhow, Treasurer*, 114 U. S. 270, was more directly in point. The action was one of detinue for personal property against the agent of the State upon the ground that the defendant in illegally seizing property had

acted as a wrongdoer and, therefore, could be sued in detinue. This Court ordered delivery of personal property to plaintiff from the Agent of the State. Basing the decision largely upon *U. S.* v. *Lee* and *Osborn* v. *Bank*, the Court held that the suit was not one against the State and said (at p. 282):

> "The case, then, of the plaintiff below is reduced to this: He had paid the taxes demanded of him by a lawful tender. The defendant had no authority of law thereafter to attempt to enforce other payment by seizing his property. In doing so, he ceased to be an officer of the law and became a private wrongdoer. It is the simple case in which the defendant, a natural private person, has unlawfully, with force and arms, seized, taken and detained the personal property of another. That an action of detinue will lie in such a case, according to the law of Virginia, has not been questioned. The right of recovery would seem to be complete, unless this case can be met and overthrown on some of the grounds maintained in argument by counsel for the defendant in error."

Discussing the question of sovereign immunity and necessary parties, the Court said (at p. 288):

> "The *ratio decidendi* in this class of cases is very plain. A defendant sued as a wrongdoer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. He is bound to establish it. The State is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a defendant, in order to complete his defense, to produce a law of the State which constitutes his commission as its agent, and a warrant for his act. This the defendant in the present case undertook to do. He relied on the Act of January 26, 1882, requiring him to collect taxes in gold, silver, United States treasury notes, national bank currency, and nothing else, and thus forbidding his receipt of coupons in lieu of money. That, it is true,

is a legislative Act of the government of Virginia, but it is not a law of the State of Virginia. The State has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The Constitution of the United States and its own contract, both irrepealable by any act on its part, are the law of Virginia; and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax, thereafter taken, *to be without warrant of law, and therefore a wrong.* He stands, then, stripped of his official character, and, confessing a personal violation of the plaintiff's rights, for which he must personally answer, he is without defense." (Emphasis supplied.)

Discussing the nature of the action, the Court said (at p. 295):

"Although the plaintiff below was nominally the actor, the action itself is purely defensive. Its object is merely to resist an attempted wrong and to restore the *status in quo* as it was when the right to be vindicated was invaded. In this respect it is upon the same footing with the preventive remedy of injunction in equity, when that jurisdiction is invoked, and of which a conspicuous example, constantly followed in the courts of the United States, was the case of *Osborn* v. *Bank of U. S., ubi supra.*"

Smith v. *Reeves*, 178 U. S. 436, was the usual type of suit to recover taxes claimed to have been illegally collected. It being held that the money in question had been covered into the Treasury of the State of California, the Court held that in reality it was a suit against the State. As *dictum* the Court added (at p. 439):

"This case is unlike those in which we have held that a suit would lie by one person against another person to recover possession of specific property, although the latter claimed that he was in possession as an officer of the state and not otherwise. In such a case, the settled doctrine of this court is that the question of possession does not cease to be a judicial question—as between the

parties actually before the court—because the defendant asserts or suggests that the right of possession is in the state of which he is an officer or agent. *Tindal* v. *Wesley*, 167 U. S. 204, 221, and authorities there cited."

Tindal v. *Wesley*, 167 U. S. 204, directly involved an attempt to recover property, together with damages for withholding possession. It was brought against the Secretary of State of South Carolina, and an employee of the State in actual possession. The defendants answered and averred that they had no personal interest in the property, that they held in their official capacity only, and that title and right to possession was in the State and that consequently the court had no jurisdiction. The Court said (at p. 221):

"The adjudged cases in principle determine the one before us. The settled doctrine of this court wholly precludes the idea that a suit against individuals to recover possession of real property is a suit against the state simply because the defendant holding possession happens to be an officer of the state and asserts that he is lawfully in possession on its behalf. We may repeat here what was said by Chief Justice Marshall, delivering the unanimous judgment of this court in *United States* v. *Peters*, 5 Cranch, 115, 139: 'It certainly can never be alleged that a mere suggestion of title in a state to property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title.' Whether the one or the other party is entitled in law to possession is a judicial, not an executive or legislative, question. It does not cease to be a judicial question because the defendant claims that the right of possession is in the government of which he is an officer of agent."

Further, at p. 222, Court said:

"If a suit against officers of a state to enjoin them from enforcing an unconstitutional statute, whereby the plaintiff's property will be injured, or to recover damages for taking under a void statute the property

of the citizen, be not one against the state, it is impossible to see how a suit against the same individuals to recover the possession of property belonging to the plaintiff and illegally withheld by the defendants can be deemed a suit against the state."

Chapman v. *County of Douglas*, 107 U. S. 348, involved an effort to recover land from the County of Douglas, Nebraska, and the Court said (at p. 355):

"As was said by this court in *Marsh* v. *Fulton Co.*, 10 Wall. 681, and repeated in *Louisiana* v. *Wood*, 102 U. S. 294, 'The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.'"

Petitioners seek to distinguish the case at bar from cases like *Marion* v. *Sneeden, supra*, first, upon the ground that here the pledged bonds were sold and second, upon the ground that this suit was brought in equity. The same contention was made in *Baldwin* v. *Chase National Bank of City of New York*, 16 F. Supp. 918 (reversed on other grounds in *Berger* v. *Chase National Bank* (C. C. A. 2d), decided July 24, 1939), and in that case, Knox, District Judge, said (at p. 922):

"The complete want of power to make the pledge carried with it an incapacity to authorize a sale by any one for the purpose of 'executing' the transaction. Nor could the act of the Secretary of War—an act which the bank was powerless to authorize—in attempting to execute the contract by selling the securities, create in him the authority he lacked. An abortive effort to make an agreement cannot transform the attempt into an accomplished fact.

"Transmutation of the bank's property from one type of chose in action, viz., bonds, to another type, viz., a bank deposit, did not operate to vest an interest in the intended pledgee; it was a brutum fulmen. Indeed, the withholding of the securities illegally obtained might well be considered a conversion."

7. The United States is not a necessary party to the suit because petitioners are unable to show that the United States has any legal interest in the property which is the subject matter of the suit. Since petitioners have control of respondent's funds in the Hamilton National Bank and since they have no legal interest in such property, they have a duty to return that property, and the Court may enforce such duty by its decree.

Fundamental to the cases in which this Court has held e sovereign not to be a necessary party has been the hold- g that the taking of the property involved was a void oceeding. Thus, in *Osborn* v. *Bank*, the taking was held d because the statute relied upon was void. The same uation existed in *Smith* v. *Reeves, supra*. Here, the void ng was the pledge contract between the bank and the retary of War. It seems obvious that no more rights s under a void contract than under a void statute. Such the holding of this Court in the *Pottorff* and *Sneeden* es, *supra*. It results that the taking and withholding er a void contract is just as illegal as under a void ute.

this sense, the instant case falls within the classifica- of cases defined in *Pennoyer* v. *McConnaughy, supra*, rein the United States was held not to be a necessary y, (140 U. S. 1, 10):

"The other class is where a suit is brought against lefendants who, claiming to act as officers of the State, nd under the color of an unconstitutional statute, ommit acts of wrong and injury to the rights and roperty of the plaintiff acquired under a contract ith the State. Such suit, whether brought to recover oney or property in the hands of such defendants, nlawfully taken by them in behalf of the State, or for mpensation in damages, or, in a proper case where e remedy at law is inadequate, for an injunction to revent such wrong and injury, or for a mandamus, a like case, to enforce upon the defendant the per-

formance of a plain legal duty, purely ministerial, is not within the meaning of the Eleventh Amendment an action against the State. *Osborn* v. *Bank of United States*, 9 Wheat. 738; *Davis* v. *Gray*, 16 Wall. 203; *Tomlinson* v. *Branch*, 15 Wall. 460; *Litchfield* v. *Webster County*, 101 U. S. 773; *Allen* v. *Baltimore & O. R. Co.*, 114 U. S. 311; *Louisiana Board of Liquidation* v. *McComb*, 92 U. S. 531; *Poindexter* v. *Greenhow*, 114 U. S. 270."

As already pointed out, this was also the precise situation existing in *Osborn* v. *Bank, supra*, which caused this Court to say (at p. 859):

> "It was proper then, to make a decree against the defendants in the Circuit Court, if the law of the State of Ohio be repugnant to the constitution, or to a law of the United States made in pursuance thereof, so as to furnish no authority to those who took, or to those who received, the money for which this suit was instituted."

Similarly, in this connection, there should be repeated, the following holding of this Court in *Poindexter* v. *Greenhow, supra* (at p. 295):

> "Although the plaintiff below was nominally the actor, the action itself is purely defensive. Its object is merely to resist an attempted wrong and to restore the *status in quo* as it was when the right to be vindicated was invaded. In this respect it is upon the same footing with the preventive remedy of injunction in equity, when that jurisdiction is invoked, and of which a conspicuous example, constantly followed in the courts of the United States, was the case of *Osborn* v. *Bank of U. S., ubi supra.*"

Petitioners here have control of the funds sought to be recovered. That petitioners have both possession and control of it, but no official interest in it, results from the discussion above. In a brief filed by the Department of Justice through its Assistant Attorney General,

102 F.(2d)622.

in *Cummings, as Alien Property Custodian of the United States* v. *Hardee*, #7127, in the United States Court of Appeals for the District of Columbia, it was claimed in that case that the money involved had actually been covered into the Treasury of the United States. Discussing the contrary situation (which exists here) the Assistant Attorney General said (at p. 17):

> "If the administrative fund were a cash fund legally deposited in a private bank to the unrestricted credit of the Attorney General, then obviously he would have both possession and control of it."

A similar result follows here and a distinction may not be made upon the ground that the original taking was by the Secretary of War, whereas the present holding is by another Secretary of War. A wrongful withholding is fundamentally the same as a wrongful taking, at least insofar as the right to recover the property is concerned.

It has never been considered, even in an action at law, that transfer of possession from the original wrongful taker to another would defeat recovery.

Similar principles apply with respect to trusts. Thus, Mr. Justice Holmes, when a member of the Supreme Judicial Court of Massachusetts, in *Otis* v. *Otis*, 167 Mass. 245, 45 N. E. 737, said:

> "* * * A person to whose hands a trust fund comes by conveyance from the original trustee is chargeable as a trustee in his turn if he takes it without consideration, whether he has notice of the trust or not. This has been settled for 300 years,—since the time of uses. 'If the feoffees enfeoff one without consideration it is to the first use although it be without notice.' Y. B. 14 Hen. VIII, p. 9, pl. 5; Chudleigh's Case, 1 Coke 120, 122b; *Mansell* v. *Mansell*, 2 P. Wms. 678, 681; *Clark* v. *Flint*, 23 Pick. 231, 243; *Atlantic Cotton Mills* v. *Indian Orchard Mills*, 147 Mass. 268, 272, 273, 17 N. E. 496; Lewin Trusts (9th Ed.) 976; 1 Perry, Trusts (4th Ed.) Secs. 217, 220."

This rule was stated as follows by this Court in *Chapman* v. *Douglas County Comrs.*, 107 U. S. 348, 357, 358:

> "The conveyance by Chapman to the County of Douglas passed the legal title, but upon a condition in the contract which it was impossible in law for the county to perform. There resulted, therefore, to the grantor the right to rescind the agreement upon which the deed was made, and thus to convert the county into a trustee, by construction of law, of the title for his benefit, according to the often repeated rule as stated by Hill on Trustees, 144, that 'Whenever the circumstances of a transaction are such that the person who takes the legal estate in property cannot also enjoy the beneficial interest, without necessarily violating some established principle of equity, the court will immediately raise a constructive trust and fasten it upon the conscience of the legal owner, so as to convert him into a trustee for the parties, who, in equity, are entitled to the beneficial enjoyment.' Upon this principle, the vendor of real estate is treated as trustee of the title for the purchaser; and the mortgagee, having the legal title, after payment of the mortgage debt, is a trustee for the mortgagor. The analogy is complete between these, and every case, of which the present is one, where the holder of the legal title is under a duty to convey to another."

Petitioners likewise refer to *Chapman* v. *Douglas County Commissioners*, and contend that it establishes that the creation of a constructive trust results in vesting legal title in the trustee. The fact is, however, that in said case legal title was conveyed by deed and therefore creation of the legal title did not result from the creation of the constructive trust; the contrary was the fact. The court held, in effect, as indicated by the foregoing quotation, that notwithstanding the formal passage of legal title, nevertheless, where the circumstances of a transaction were such that the person taking legal title could not also enjoy the beneficial interest without necessarily violating equity, the court would immediately raise a constructive trust and fasten it

upon the conscience of the legal owner so as to convert him into a trustee for the parties, who, in equity, were entitled to the beneficial enjoyment.

A vital distinction exists between the instant cases and cases such as *Murray* v. *Wilson Distilling Company*, 213 U. S. 151 and *Langford* v. *Platte Iron Works*, 235 U. S. 461, 472, 473, cited by petitioners. Those cases turned upon the fact that the fund in controversy was actually in the public treasury concerned.

It is a commonplace of the law that where one has control, custody, or mere possession of personal property, obtained under a mistake of fact or as a wrongdoer, he does not thereby get a good title. Possession is at best mere *prima facie* evidence of ownership. The reason is that possession may result from a bailment, or a trespass. *Miller Piano Co.* v. *Parker*, 155 Pa. 208, 26 Atl. 303; *In re Metallic Specialty Mfg. Co.*, 210 Fed. 663. It is likewise settled law that one who takes with notice or without consideration gets no more title than had his transferor.

Therefore, to contend, as do petitioners, that the transfer of possession and control of choses in action in the case at bar to Dern, Secretary of War, and by him without consideration to Woodring, Secretary of War, makes the United States an indispensable party, is to assume that the transfer vested a valid interest or title, which is an assumption not justified by law. *Pullman's Palace Car Co.* v. *Central Transportation Co., supra.*

In the cases cited by petitioners, or found by respondents, in which it was contended that the United States or the State was an indispensable party on the ground that title to the subject-matter was in the United States or the State, this Court has examined the facts and where it was found that valid title did not rest in the sovereign has held that the sovereign is not an indispensable party. *Osborn* v. *Bank of the United States, supra.*; *Cammeyer* v. *Newton*, 94 U. S. 225; *United States* v. *Lee, supra.*; *Tindal* v. *Wesley*, *supra.*; *Poindexter* v. *Greenhow, supra.*; *Ickes* v. *Fox, supra.*

The exceptions were cases where valid title was admitted to be in the sovereign, or it appeared from the face of the record that a valid title had at some previous time vested in the sovereign, (*Minnesota* v. *United States*, 305 U. S. 382; *Nagonab* v. *Hitchcock*, 202 U. S. 473; *Arizona* v. *California*, 298 U. S. 558; *State of Louisiana* v. *Garfield*, 211 U. S. 70; *New Mexico* v. *Lane*, 243 U. S. 52; *Oregon* v. *Hitchcock*, 202 U. S. 473). Such exceptions do not apply to the case at bar.

III.

THE ALLOWANCE OF INTEREST IN THE JUDGMENT BELOW.

Petitioners urge that the judgment should be reversed because of the allowance of interest to respondent. Even should this Court decide the Court below erred with respect to the allowance of interest, it could follow its course in Osborn v. Bank of the United States and reverse that part of the judgment only.

In this connection it would appear proper to advise the Court that no objection was made to the allowance of interest in the decree; the decree was consented to as to form; no assignment of error was made with respect to the allowance of interest; the point was neither briefed nor argued in the U. S. Court of Appeals for the District of Columbia; nor was it urged or relied upon in the petition for *certiorari*.

In this situation it would appear that petitioners have lost all right to urge this as a ground of reversal in this Court and that it should not be noticed.

A. Schrader's Sons, Inc. v. *Wein Sales Corp.*, (C. C. A. 2) 9 F. (2d) 306;
U. S., ex rel. Mastoras v. *McCandless*, (C. C. A. 3) 61 F. (2d) 366;
Helvering v. *Helmholz*, (U. S. C. A., D. C.) 75 F. (2d) 245;
Rorick v. *Devon Syndicate, Ltd.*, 307 U. S. 299.

In the last cited case the Court said, (at page 303):

"Of the various questions raised below and briefed here, only those urged in the petition for certiorari and incidental to their determination will be considered on review. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175; *Connecticut Railway & Lighting Co.* v. *Palmer*, 305 U. S. 493."

The various circuit courts of appeals have consistently awarded interest in cases of this character and this Court has consistently denied *certiorari*.

In the case of *Redfield Independent School District No. 20* . *Schnetzer*, 94 F. (2d) 257, the trial court awarded interest rom the date of the conversion of the illegally pledged se- urities, which was noted by the Appellate Court, where in s opinion on page 258 it said:

"The trial court held that the pledge was void; that the school district was an unsecured creditor which had, by mistake, received an overpayment out of the assets of the insolvent estate; and that *the receiver was entitled to recover the overpayment with interest.* Judgment was entered accordingly." (Italics supplied.)

The Appellate Court concluded (at page 259):

"The judgment of the court below was correct and is affirmed."

n *Hood* v. *Hardesty*, 94 F. (2d) 26, the trial court granted erest from the date of the preferential payment to the te bank receiver, and the allowance of interest was in- led in the general affirmance of the Circuit Court without ment.

City of Chicago v. *Joseph*, 95 F. (2d) 444, (cert. den. U. S. 578), the Court in awarding interest, stated (at e 447):

"When the city wrongfully retained the property of plaintiff and converted it into money, it committed a wrongful act and is *chargeable with interest* from the time of demand." (Italics supplied.)

The District Court there having failed to allow interest, the Appellate Court ordered (at page 447):

> "The judgment is reversed, with directions to the District Court to enter one for the same amount with interest at 5 per cent, from the date of demand and the costs in that court."

And see:

LaParr v. *City of Rockford*, (C. C. A. 7) 100 F. (2d) 564, 568;
Downey v. *City of Yonkers*, (S. D. N. Y.) 23 Fed. Supp. 1018, affirmed;
Downey v. *City of Yonkers*, (C. C. A. 2) Aug. 3, 1939.

IV.

CONCLUSION.

Applying the principles in the foregoing discussion to the instant case, and particularly with reference to the principles developed in *Osborn* v. *Bank of United States*, it seems to respondent that inasmuch as recovery of the fund in the *Osborn* case was permitted on the ground, inter alia, that the transaction in the course of which it was acquired was void and hence no beneficial interest passed, so, in the instant case, the pledge contract was void and no beneficial interest passed either as to the pledged assets or their proceeds. No valid and substantial distinction can be drawn from the factual difference that in the *Osborn* case the fund was in the form of money held in a trunk which the holder thereof was obliged to turn over to the true owner by such affirmative acts as might be necessary to accomplish such delivery and the fact that in the instant case the proceeds of the collateral are held in the Hamilton Bank and that the petitioners may be required to take affirmative action by way of withdrawing it from the bank and restoring it to respondent. The factual difference between money in a trunk and money on credit in a bank does not result in a difference in principle between the two cases. Petitioners do not have to obtain an appropriation

Congress to withdraw the money from the bank nor do
y have to obtain the permission of the Canal Zone gov-
ment to withdraw the money from the bank; it was put
e illegally by petitioners' predecessors and retained
e illegally by petitioners and therefore petitioners
ld be required to withdraw the funds from the bank
restore them to respondent as the rightful owner.
e is no difference in legal effect between possession of
se in action such as a bank account and possession of
other type of personal property.

Respectfully submitted,

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OCT 5 1939
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 5.

HARRY H. WOODRING, Secretary of War, and H. A. A. SMITH, General Purchasing Officer and Chief of Washington Office, Panama Canal, *Petitioners,*

v.

JUSTUS S. WARDELL, Receiver, District National Bank of Washington, D. C., *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

APPENDIX FOR THE RESPONDENT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

APPENDIX FOR THE RESPONDENT.

U. S. C., Title 6, Sec. 15.

BONDS OR NOTES OF UNITED STATES IN LIEU OF RECOGNIZANCE, STIPULATION, BOND, GUARANTY, OR UNDERTAKING; PLACE OF DEPOSIT; RETURN TO DEPOSITOR; CONTRACTORS' BONDS. Wherever by the laws of the United States or regulations made pursuant thereto, any person is required

to furnish any recognizance, stipulation, bond, guaranty, or undertaking, hereinafter called "penal bond," with surety or sureties, such person may, in lieu of such surety or sureties, deposit as security with the official having authority to approve such penal bond, United States Liberty bonds or other bonds or notes of the United States in a sum equal at their par value to the amount of such penal bond required to be furnished, together with an agreement authorizing such official to collect or sell such bonds or notes so deposited in case of any default in the performance of any of the conditions or stipulations of such penal bond. The acceptance of such United States bonds or notes in lieu of surety or sureties required by law shall have the same force and effect as individual or corporate sureties, or certified checks, bank drafts, post-office money orders, or cash, for the penalty or amount of such penal bond. The bonds or notes deposited hereunder, and such other United States bonds or notes as may be substituted therefor from time to time as such security, may be deposited with the Treasurer of the United States, a Federal reserve bank, or other depositary duly designated for that purpose by the Secretary, which shall issue receipt therefor, describing such bonds or notes so deposited. As soon as security for the performance of such penal bond is no longer necessary, such bonds or notes so deposited shall be returned to the depositor. In case a person or persons supplying a contractor with labor or material as provided by section 270 of Title 40 shall file with the obligee, at any time after a default in the performance of any contract subject to said section 270, the application and affidavit therein provided, the obligee shall not deliver to the obligor the deposited bonds or notes nor any surplus proceeds thereof until the expiration of the time limited by said section 270 for the institution of suit by such person or persons, and, in case suit shall be instituted within such time, shall hold said bonds or notes or proceeds subject to the order of the court having jurisdiction thereof. Nothing herein contained shall affect or impair the priority of the claim of the United States against the bonds or notes deposited or any right or remedy granted by said section 270 or by this section to the United States for default upon any obligation of said penal bond. All laws inconsistent with this section are hereby so modified as to conform to the provisions hereof.

othing contained herein shall affect the authority of urts over the security, where such bonds are taken as curity in judicial proceedings, or the authority of any lministrative officer of the United States to receive United ates bonds for security in cases authorized by existing ws. The Secretary may prescribe rules and regulations cessary and proper for carrying this section into effect. he term "person" in this section means an individual, a ust or estate, a partnership, or a corporation; the term Secretary" means the Secretary of the Treasury. (Feb. , 1919, c. 18, sec. 1320, 40 Stat. 1148; Nov. 23, 1921, c. 136, c. 1329, 42 Stat. 318; June 2, 1924, 4.01 p. m., c. 234, sec. 2, 29, 43 Stat. 253, 349.)

. S. C., Title 11, Section 101. Depositories for money.

The judges of the several courts of bankruptcy shall desnate, by order, banking institutions as depositories for e money of estates under this title, as convenient as may to the residences of receivers and trustees, and shall quire from each such banking institution a good and suffient bond with surety, to secure the prompt repayment of e deposit. Said judges may, in accordance with the prosions of, and the authority conferred in section 1126 of e Revenue Act of 1926, as amended accept the deposit of e securities therein designated, in lieu of a surety or ireties upon such bond and may, from time to time as casion may require, by like order increase or decrease the mber of depositories or the amount of any bond or other curity or change such depositories: Provided, That no curity in the form of a bond or otherwise shall be reired in the case of such part of the deposits as are inred under section 264 of Title 12, as amended: And prolded further, That depository banks shall place such seurities, accepted for deposit in lieu of a surety or sureties on depository bonds, in the custody of Federal Reserve anks or branches thereof designated by the judges of the veral courts of bankruptcy, subject to the orders of such dges. All national banking associations designated as positories, pursuant to the provisions of this section of is title, are authorized to give such security as may be quired. All pledges of securities heretofore made for e purposes herein named are hereby ratified, validated

and approved. As amended June 22, 1938, c. 575, Sec. 1, 52 Stat. 872.

U. S. C., Title 12, sec. 24. Corporate powers of associations.

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

First. To adopt and use a corporate seal.

Second. To have succession from February 25, 1927, or from the date of its organization if organized after February 25, 1927, until such time as it be dissolved by the act of its shareholders owning two-thirds of its stock, or until its franchise becomes forfeited by reason of violation of law, or until terminated by either a general or a special Act of Congress or until its affairs be placed in the hands of a receiver and finally wound up by him.

Third. To make contracts.

Fourth. To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.

Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of

debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title. The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock: *Provided,* That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe. In no event shall the total amount of the investment securities of any one obligor or maker, held by the association for its own account, exceed at any time 10 per centum of its capital stock actually paid in and unimpaired and 10 per centum of its unimpaired surplus fund, except that this limitation shall not require any association to dispose of any securities lawfully held by it on August 23, 1935. As used in this section the term "investment securities" shall mean marketable obligations evidencing indebtedness of any person, copartnership, association, or corporation in the form of bonds, notes and/or debentures commonly known as investment securities under such further definition of the term "investment securities" as may by regulation be prescribed by the Comptroller of the Currency. Except as hereinafter provided or otherwise permitted by law, nothing herein contained shall authorize the purchase by the association for its own account of any shares of stock of any corporation. The limitations and restrictions herein contained as to dealing in, underwriting and purchasing for its own account, investment securities shall not apply to obligations of the United States, or general obligations of any State or of any political subdivision thereof, or obligations issued under authority of chapter 7 of this title, or issued by the Federal Home Loan Banks or the Home Owners' Loan Corporation, or obligations which are insured by the Federal Housing Administrator pursuant to section 1713 of this title, if the debentures to be issued in payment of such insured obligations are guaranteed as to principal and interest by the United States: *Provided,* That in carrying on the business commonly known as the safe-deposit business

the association shall not invest in the capital stock of a corporation organized under the law of any State to conduct a safe-deposit business in an amount in excess of 15 per centum of the capital stock of the association actually paid in and unimpaired and 15 per centum of its unimpaired surplus.

The restrictions of this section as to dealing in investment securities shall take effect one year after June 16, 1933.

But no association shall transact any business except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller of the Currency to commence the business of banking. (R. S. sec. 5136; July 1, 1922, c. 257, sec. 1, 42 Stat. 767; Feb. 25, 1927, c. 191, sec. 2, 44 Stat. 1226; June 16, 1933, c. 89, sec. 16, 48 Stat. 184; Aug. 23, 1935, c. 614, sec. 308, 49 Stat. 709.)

U. S. C., Title 12, sec. 90. Depositaries of public moneys and financial agents of Government.

All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: *Provided*, That the Secretary shall, on or before the 1st of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: *Provided*, That the Secretary of the Treasury shall distribute the deposits

herein provided for, as far as practicable, equitably between the different States and sections.

Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State. (R. S. sec. 5153; Mar. 3, 1901, c. 871, 31 Stat. 1448; Mar. 4, 1907, c. 2913, sec. 3, 34 Stat. 1290; Dec. 23, 1913, c. 6, sec. 27, 38 Stat. 274; Aug. 4, 1914, c. 225, 38 Stat. 682; June 25, 1930, c. 604, 46 Stat. 809.)

U. S. C., Title 12, sec. 91. Transfers by bank and other acts in contemplation of insolvency.

All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court. (R. S. sec. 5242.)

U. S. C., Title 12, sec. 192. Default in payment of circulating notes.

On becoming satisfied, as specified in sections 131 and 132 of this title, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records,

and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings.

Provided, That the comptroller may, if he deems proper, deposit any of the money so made in any regular Government depositary, or in any State or national bank either of the city or town in which the insolvent bank was located, or of a city or town as adjacent thereto as practicable; if such deposit is made he shall require the depositary to deposit United States bonds or other satisfactory securities with the Treasurer of the United States for the safekeeping and prompt payment of the money so deposited: *Provided,* That no security in the form of deposit of United States bonds, or otherwise, shall be required in the case of such parts of the deposits as are insured under section 264 of this title. Such depository shall pay upon such money interest at such rate as the comptroller may prescribe, not less, however, than 2 per centum per annum upon the average monthly amount of such deposits. (R. S. sec. 5234; May 15, 1916, c. 121, 39 Stat. 121; Aug. 23, 1935, c. 614, sec. 339, 49 Stat. 721.)

U. S. C., Title 12, sec. 194. Dividends on adjusted claims; distribution of assets.

From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated;

and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held. (R. S. sec. 5236.)

U. S. C., Title 12, Section 332. Depositaries of public money; financial agents; security required.

All banks or trust companies incorporated by special law or organized under the general laws of any State, which are members of the Federal reserve system, when designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require of the banks and trust companies thus designated satisfactory security, by the deposit of United States bonds or otherwise, for the safe keeping and prompt payment of the public money deposited with them and for the faithful performance of their duties as financial agents of the Government. (Dec. 23, 1913, c. 6, Sec. 9, 38 Stat. 259; May 7, 1928, c. 507, 45 Stat. 492.)

U. S. C., Title 25, Section 156.

Deposit of funds from sales of lands and property of Five Civilized Tribes. The net receipts from the sales of surplus and unallotted lands and other tribal property belonging to any of the Five Civilized Tribes, after deducting the necessary expense of advertising and sale, may be deposited in national or State banks in the State of Oklahoma in the discretion of the Secretary of the Interior, such depositories to be designated by him under such rules and regulations governing the rate of interest thereon, the time of deposit and withdrawal thereof, and the security therefor, as he may prescribe. The interest accruing on such funds may be used to defray the expense of the per capita payments of such funds. (Mar. 3, 1911, c. 210, Sec. 17, 36 Stat. 1070.)

U. S. C., Title 31, Sec. 191.

PRIORITY ESTABLISHED. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed. (R. S., sec. 3466.)

U. S. C., Title 39, Sec. 759.

DEPOSIT OF FUNDS IN BANKS; INTEREST; RESERVE; SECURITY; DEPOSITS WITH TREASURER OF BOARD OF TRUSTEES. Postal savings funds received under the provisions of this chapter shall be deposited in solvent banks, whether organized under national or State laws, and whether member banks or not of the Federal reserve system, being subject to national or State supervision and examination, and the sums deposited shall bear interest at the rate of not less than 2¼ per centum per annum, which rate shall be uniform throughout the United States and Territories thereof; but 5 per centum of such funds shall be withdrawn by the board of trustees and kept with the Treasurer of the United States, who shall be treasurer of the board of trustees, in lawful money as a reserve. The board of trustees shall take from such banks such security in public bonds or other securities, authorized by Act of Congress or supported by the taxing power, as the board may prescribe, approve, and deem sufficient and necessary to insure the safety and prompt payment of such deposits on demand. The funds received at the postal savings depository offices in each city, town, village, and other locality shall be deposited in banks located therein (substantially in proportion to the capital and surplus of each such bank) willing to receive such deposits under the terms of this chapter and the regulations made by authority thereof. If one or more member banks of the Federal reserve system exists in the city, town, village, or locality where the postal sav-

gs deposits are made, such deposits shall be placed in ch qualified member banks substantially in proportion the capital and surplus of each such bank, but if such ember banks fail to qualify to receive such deposits, then y other bank located therein may, as hereinbefore pro-ded, qualify and receive the same. If no such member nk and no other qualified bank exists in any city, town, llage, or locality, or if none where such deposits are made ill receive such deposits on the terms prescribed, then ch funds shall be deposited under the terms of this chap-r in the bank most convenient to such locality. If no such nk in any State or Territory is willing to receive such eposits on the terms prescribed, then such funds shall be eposited with the treasurer of the board of trustees and all be counted in making up the reserve of 5 per centum. uch funds may be withdrawn from the treasurer of said oard of trustees, and all other postal savings funds, or ny part of such funds, may be at any time withdrawn from e banks and savings depository offices for the repayment postal savings depositors when required for that pur-ose. If at any time the postal savings deposits in any tate or Territory shall exceed the amount which the quali-ed banks therein are willing to receive under the terms this chapter, and such excess amount is not required to ake up the reserve fund of 5 per centum hereinbefore rovided for, the board of trustees may invest all or any art of such excess amount in bonds or other securities of e United States. When, in the judgment of the Presi-ent, the general welfare and interests of the United States require, the board of trustees may invest all or any part the postal savings funds, except the reserve fund of 5 er centum herein provided for, in bonds or other securi-es of the United States. The board of trustees may in its iscretion purchase from the holders thereof bonds which ave been or may be issued under the provisions of section 60 of this title. Interest and profit accruing from the de-osits or investment of postal savings funds shall be ap-lied to the payment of interest due to postal savings de-ositors, as hereinbefore provided, and the excess thereof, any, shall be covered into the Treasury of the United tates as a part of the postal revenue. Postal savings nds in the treasury of said board shall be subject to dis-osition as provided in this chapter, and not otherwise. he board of trustees may at any time dispose of bonds

held as postal savings investments and use the proceeds to meet withdrawals of deposits by depositors. The word "Territory" as used herein shall be held to include the District of Columbia, the Territory of Alaska, and Porto Rico, and the word "bank" shall be held to include savings banks and trust companies doing a banking business. (Aug. 24, 1912, c. 387, sec. 1, 37 Stat. 512; May 18, 1916, c. 126, sec. 2, 39 Stat. 159.)

COPY

March 24, 1920

Cashier,
District National Bank,
Washington, D. C.

Dear Sir:

The Government is borrowing on Treasury certificates of indebtedness at rates of interest varying from 4¼% to 4¾%. The Treasury, therefore, has no surplus funds to leave with National bank depositaries at 2% interest, except where it is necessary to maintain balances with such depositaries for the performance of some essential Government business. Having discontinued all national bank dpositaries in cities where Federal Reserve Banks and branch Federal Reserve Banks are located and equipped to transact the Government's business, the Treasury feels that it must, as a measure of consistency and of administrative economy, discontinue national bank depositaries in the city of Washington where the office of the Treasurer of the United States is located.

You will, accordingly, please transfer on or before March 31st to the Treasurer of the United States all funds on deposit with your bank to the credit of the Treasurer's General Account, and from that date you will accept no deposits to the credit of that account.

After the transfer of funds has been made as directed, you should forward to this office and to the Treasurer of the United States a final transcript reporting the transfer to have been made. There should be attached to the transcript furnished this office a statement sworn to by the President and Cashier of your bank to the effect that:

"The balance above reported as transferred comprised the entire indebtedness of this bank for public moneys on deposit to the credit of the Treasurer of the United States."

your bank has on deposit any funds to the credit of r Government officers than the Treasurer of the United es, excluding bankruptcy funds and postal savings ds, please advise this office immediately and you will nstructed as to the disposition of those funds.

pon payment of the interest due and the receipt by Treasurer of the United States of a Resolution of your rd of Directors authorizing the withdrawal and dispo-n of the collateral now lodged with the Treasurer to re the public deposit, together with his receipt which now hold for said collateral, the securities in question be released and the District National Bank of Wash-on, D. C. discontinued as a depositary of public moneys.

he above discontinuance, however, does not affect the gnation of your bank as a special depositary under the visions of Department Circular No. 92.

y direction of the Secretary.

Respectfully,

(signed) R. C. LEFFINGWELL
Assistant Secretary of the Treasury.

B/cp

1919.
Department Circular No. 176.

Public Moneys.

TREASURY DEPARTMENT,
Office of the Secretary,
Washington, December 31 1919.

To the Treasurer and Assistant Treasurers of the United States, Federal Reserve Banks, National Bank Depositaries, Special Depositaries of Public Moneys, Collectors of Internal Revenue, Collectors of Customs, Receivers of Public Moneys, Depository Postmasters, Marshals and Clerks of Courts, all other Officers or Agents of the United States engaged in collecting, depositing, or transmitting public moneys, and others concerned:

DEPOSIT OF PUBLIC MONEYS.

1. All public moneys shall be deposited with the Treasurer of the United States, Federal Reserve Banks and branches, Assistant Treasurers of the United States, and regular National bank depositaries, and, as provided in paragraph 3 hereof, with special depositaries under the act approved September 24, 1917, as amended and supplemented, all in accordance with the provisions of this circular and subject to the exceptions hereinafter provided. All deposits of public moneys hereunder (except with such special depositaries) shall be for credit to the account of the Treasurer of the United States. The term "Federal Reserve Bank" where it appears in this circular, unless otherwise indicated by the context, includes branch Federal Reserve Banks with which deposits are authorized to be made. All collectors, receivers of public moneys of every description, and other persons having public money to pay to the United States are hereinafter sometimes called depositors of public moneys.

GENERAL PROVISIONS AS TO DEPOSITARIES.

2. *Classes of depositaries.*—The established policy of the Treasury Department is to designate and maintain balances with regular National bank depositaries of public moneys only at points where a depositary is necessary to meet the requirements of Government officers for cash for pay-roll or other expenditures, and then only if there is no Federal Reserve Bank or branch located at or near the point. National banks when designated by the Secretary of the Treasury, however, may be depositaries of public moneys with a maximum qualification, for the sole purpose of receiving deposits made by United States courts and their officers, by postmasters, or by other duly authorized Government officers, for credit to their official disbursing accounts elsewhere than with the Treasurer of the United States, provided that such depositaries qualify, before receiving deposits, by pledging as collateral security for such deposits, including interest thereon, securities of the classes described in paragraph 26 hereof, to an amount, taken at the rates therein provided, at least equal to such deposits. National bank depositaries designated with a maximum qualification for this purpose alone are not thereby authorized to accept any other deposits hereunder. Deposits arising from the proceeds of sales of bonds, notes, and Treasury certificates of indebtedness of the United States, and the payment of income and profits taxes, may be made from time to time with special depositaries of public moneys under the act of Congress approved September 24, 1917, as amended and supplemented. Other deposits of public moneys are maintained with the several Federal Reserve Banks, pursuant to the provisions of Section 15 of the Federal Reserve Act, as amended. All inactive National bank depositaries are being discontinued, pursuant to action already taken by the Secretary of the Treasury.

3. *Special depositaries.*—Any incorporated bank or trust company in the United States desiring to participate in deposits of public moneys arising from the sale of bonds, notes, or Treasury certificates of indebtedness of the United States, or from the payment of income or profits taxes, under Section 8 of the act approved September 24, 1917, as amended and supplemented, may make application for

designation as a special depositary of public moneys to the Federal Reserve Bank of its district, pursuant to Treasury Department Circular No. 92, as from time to time amended and supplemented. Detailed regulations governing such depositaries are prescribed in said circular, to which reference is hereby made. The remaining provisions of this circular do not apply to or govern special depositaries under said circular, and such depositaries are not, by virtue of such designation or their qualification thereunder, authorized to accept deposits hereunder from collectors or other depositors of public moneys for credit to the account of the Treasurer of the United States, or to the official disbursing accounts of Government officers.

GENERAL PROVISIONS AS TO DEPOSITS.

4. *Cash Deposits.*—All cash received by collectors of internal revenue, collectors of customs, depository postmasters, and other depositors of public moneys shall be deposited, if the depositor is located in the same city with a Federal Reserve Bank or branch bank, with such Federal Reserve Bank or branch bank, and in other cases with the regular national bank depositary or depositaries with which the depositor has been making such deposits, unless and until otherwise instructed by the Secretary of the Treasury: *Provided, however,* That depositors located in the District of Columbia shall make such deposits direct with the Treasurer of the United States. Payments made by postal or express money order shall be handled, subject to collection, in the same manner as cash.

5. *Checks and drafts.*—All checks received by any Government officer are received subject to collection, and in the event that any check can not be collected or is lost or destroyed before collection, appropriate action must be taken by the depositor in the same manner as if no check had been received. Payments made by check are not effective unless and until the check has actually been duly collected and paid. All checks shall be deposited as hereinafter specifically provided. Bank drafts shall be handled hereunder in the same manner as checks.

6. *Certificates of deposit.*—Certificates of deposit shall be issued, until further notice, on the following forms: Internal Revenue, Form 15 (National Banks); Customs, Form

1¾ (National Banks); Public Lands, Surveys and Patent Fees, Form 1A (National Banks); Army, Navy, Judiciary, and Indian, Form 1 (National Banks); Surplus Money Order Funds, Forms 6594 and 6594A; Surplus Postal Funds, Form 6598; Deposits for official checking account with Treasurer of United States, Form 6599; and Sales of War-Savings securities, Form 1312. The original of each certificate of deposit (unless otherwise specifically instructed, as in cases where the funds represented thereby are not to be covered into the Treasury by warrant) shall be transmitted to the Secretary of the Treasury (Division of Public Moneys), through the office of the Treasurer of the United States, with the transcript on Form 17 (National Banks), on which the credit appears. The other certificates of deposit in the set should be disposed of in accordance with the instructions which appear on the certificate, and one copy may be retained by the depositary for its own records. Federal Reserve Banks and branches shall see that the face of each certificate in any set of certificates of deposit covering in whole or in part items other than cash for which immediate credit is given, bears a legend reading as follows: "This certificate of deposit issued subject to deduction for uncollectible items." It is of the utmost importance that certificates of deposit be properly issued, and in this connection, depositaries should give special attention to two points, viz: (1) The name and title (if any) of the depositor, as *John Doe, receiver of public moneys,* or, in cases where the deposit is made by one person for account of another person, *John Doe, receiver of public moneys, through Richard Roe;* and (2) the account or purpose for which the deposit is received, as *Sales of public lands,* or *Sales of War-Savings securities,* with a notation of the series, which should be clearly indicated in order to enable the Treasury Department to classify the deposit and credit the proper receipt account at the same time that the depositary is charged with the amount of the deposit. Depositaries receiving deposits of Internal Revenue receipts are particularly requested to use great care in specifying upon the face of certificates of deposit on Form 15 (National Banks) deposits of "Income and Profits Taxes" separate and distinct in each case from deposits of Miscellaneous Internal Revenue Collections (formerly called "Ordinary"). It is not necessary, however, to make

any further separation of classes of Internal Revenue deposits on the face of certificates of deposit on Form 15 (National Banks).

7. *Unauthorized receipt or use of public money.*—Section 96 of the act of Congress approved March 4, 1909, provides the following penalties for the unauthorized receipt or use of public money:

Every banker, broker, or other person not an authorized depositary of public moneys, who shall knowingly receive from any disbursing officer, or collector of internal revenue, or other agent of the United States, any public money on deposit, or by way of loan or accommodation, with or without interest, or otherwise than in payment of a debt against the United States, or shall use, transfer, convert, appropriate, or apply any portion of the public money for any purpose not prescribed by law; and every president, cashier, teller, director, or other officer of any bank or banking association who shall violate any provision of this section is guilty of embezzlement of the public money so deposited, loaned, transferred, used, converted, appropriated, or applied, and shall be fined not more than the amount embezzled, or imprisoned not more than ten years, or both.

8. *Deposit of checks.*—On and after March 1, 1920, and until otherwise directed by the Secretary of the Treasury, all checks (including bank drafts) received by collectors of internal revenue, collectors of customs, depository postmasters, and other depositors of public moneys (except checks for deposit in authorized official disbursing accounts maintained by Government officers elsewhere than with the Treasurer of the United States) shall be deposited pursuant to the following instructions:

FOR SPECIAL ATTENTION OF COLLECTORS OF INTERNAL REVENUE.

9. *Deposit of checks with Federal Reserve Banks and branches.*—All checks, whether certified or uncertified, and whether or not drawn on banks or trust companies located in the same city with the collector, received by collectors of internal revenue (hereinafter in this title called collectors) and their deputies in payment of internal revenue taxes, including income and profits taxes, shall be forwarded for deposit each day by collectors, unless otherwise specifically instructed by the Secretary of the Treasury, to the Federal Reserve Bank of the district in which the collector's head office is located (or, in case the head office is located in the same city with a branch Federal Reserve Bank, to such branch Federal Reserve Bank). Specific instructions may be given by the Secretary of the Treasury in certain instances for the deposit of checks with

Federal Reserve Banks of other districts, and branches thereof. Collectors will make the necessary arrangements for deposits by their deputies in accordance herewith. Stamp deputy collectors who are located away from the head office and who receive checks in payment of internal revenue taxes will forward them to the collectors of internal revenue for their respective districts; provided, however, that if there is a Federal Reserve Bank or branch in the same city with the office of the stamp deputy collector, he shall at all times deposit such checks with such Federal Reserve Bank or branch.

10. *Classification of checks for deposit.*—Checks forwarded to the Federal Reserve Bank in accordance herewith must be accompanied by a letter of transmittal or a draft certificate of deposit (original, duplicate, and triplicate, in proper form, to be signed, dated, and numbered by the Federal Reserve Bank), and such letter of transmittal or draft certificate of deposit must, in all cases, specify the amount of the deposit representing Income and Profits Taxes separate and distinct from the amount representing Miscellaneous Internal Revenue Collections (formerly called "Ordinary"). The checks so forwarded may be inclosed under one outer wrapper, but must be separated into two classes, namely:

(1) Checks received exclusively in payment of income and profits taxes, inclosed in a separate package containing an inner wrapper or label plainly marked "Income and Profits Tax Checks only."

(2) All other checks received (in whole or in part) in payment of other internal-revenue taxes, inclosed in a separate package containing an inner wrapper or label plainly marked "Internal Revenue Collections."

Whenever practicable, collectors of internal revenue should arrange the checks so forwarded into at least two groups, namely:

(a) Checks drawn on banks and trust companies located in the same city with the Federal Reserve Bank or branch to which the checks are forwarded.

(b) Checks drawn on banks and trust companies located outside of the city in which is located the Federal Reserve Bank or branch to which the checks are forwarded.

11. *Indorsement, transmission, and collection of checks.*—The collector should stamp on the face of each check de-

posited the words, "This check is in payment of an obligation to the United States and must be paid at par. No protest," with his name and title. The Federal Reserve Bank will make an effort to collect every check on these terms. If the bank on which a check is drawn refuses to pay it at par, it will be returned to the collector in the same manner as a bad check. Checks received exclusively in payment of income and profits taxes, whether certified or uncertified, when forwarded to the Federal Reserve Bank, should be indorsed:

Pay to the order of the Federal Reserve Bank of .....
(Insert name of city in which Federal Reserve Bank, not branch, is located.)

Income and Profits Tax Account.

All other checks, whether certified or uncertified, when forwarded to the Federal Reserve Bank, should be indorsed:

Pay to the order of the Federal Reserve Bank of .....
(Insert name of city in which Federal Reserve Bank, not branch, is located.)

Internal Revenue Collections.

The checks must in all cases be forwarded by registered mail. Inasmuch as the indorsement is specific, it is not necessary that the checks be insured. Collectors and deputy collectors must, however, retain a record of the checks forwarded, so that if any checks are lost, payment may be immedately stopped and duplicates secured. Collectors are authorized by the Commissioner of Internal Revenue to incur any necessary expense from the appropriation "Collecting the War Revenue," for postage and registration charges. When transmitting the checks to the Federal Reserve Bank, the collector should request the Federal Reserve Bank to issue a certificate of deposit on Form 15 (National Banks) in his name, and to send the duplicate and triplicate of the certificate of deposit to his office, for disposition in accordance with the instructions which appear on the margin of the certificate.

12. *Uncollected and lost checks.*—Taxpayers whose checks are returned uncollected by a depositary should be immediately notified by the collector to make the checks good. If any taxpayer should fail to comply, the collector should proceed to collect the taxes by the usual methods, as though no check had been given, and if he fails to make collection within thirty days will accept the return of the check from

the Federal Reserve Bank and give receipt therefor on the reverse of Form N, copy attached. In the event that any checks for which a certificate of deposit has been given are reported lost after deposit, the collector will promptly notify the taxpayer that the check has been lost and request him to stop payment thereon and make payment by another check or cash in lieu of the original check. If the taxpayer refuses or neglects to comply, the collector should proceed to collect the taxes by the usual methods, as though no check had been given. If the taxpayer makes payment on account of the lost check, or the amount is otherwise collected, the amount should be delivered to the Federal Reserve Bank against the certificate of deposit already issued therefor. If at the expiration of thirty days the matter has not been satisfactorily adjusted, the collector will make full report to the Secretary of the Treasury, Division of Public Moneys, and receive specific instructions. Collectors are not authorized to give receipts to the depositary for lost checks.

FOR SPECIAL ATTENTION OF COLLECTORS OF CUSTOMS.

13. *Deposit of checks with Federal Reserve Banks and branches.*—All checks received by collectors of customs (hereinafter in this title called collectors and deputy collectors), whether or not such checks are drawn on banks and trust companies located in the same city with the collector, shall be forwarded for deposit each day by collectors, unless otherwise specifically instructed by the Secretary of the Treasury, to the Federal Reserve Bank of the district in which the collector's head office is located (or, in case the head office is located in the same city with a branch Federal Reserve Bank, to such branch Federal Reserve Bank). Specific instructions may be given by the Secretary of the Treasury in certain instances for the deposit of checks with Federal Reserve Banks of other districts, and branches thereof. Collectors will make the necessary arrangments for deposits by their deputies in accordance with this circular. Checks forwarded to the Federal Reserve Bank in accordance herewith must be accompanied by a letter of transmittal or a draft certificate of deposit (to consist of a full set, in proper form, to be signed, dated, and numbered by the Federal Reserve Bank), and such letter of transmittal or draft certificate of deposit must,

in all cases, specify the amounts of the deposits representing collections for the Treasury Department, Department of Commerce and Department of Labor, separate and distinct from each other, and must make such further specification within each Department as shall be required.

14. *Indorsement, transmission, and collection of checks.*—The collector should stamp on the face of each check deposited the words, "This check is in payment of an obligation to the United States and must be paid at par. No protest," with his name and title. The Federal Reserve Bank will make an effort to collect every check on these terms. If the bank on which a check is drawn refuses to pay it at par, it will be returned to the collector in the same manner as a bad check. All checks forwarded by the collector to the Federal Reserve Bank should be indorsed:

Pay to the order of the Federal Reserve Bank of .....
(Insert name of city in which Federal Reserve Bank, not branch, is located.)

with appropriate specification as to the class of deposit. The checks must, in all cases, be forwarded by registered mail. Inasmuch as the indorsement is specific, it is not necessary that the checks be insured. Collectors and deputy collectors must, however, retain a record of the checks forwarded so that if any checks are lost, payment may be immediately stopped and duplicates secured. Collectors are authorized to incur any necessary expense from the appropriation for Collecting the Revenue from Customs, for postage and registration charges. When transmitting the checks to the Federal Reserve Bank, the collector should request the Federal Reserve Bank to issue a certificate of deposit on Form 1¾ (National Banks) in his name, and to make disposition of the certificates in the set in accordance with the instructions which appear on the certificate.

FOR SPECIAL ATTENTION OF POSTMASTERS.

15. *Deposit of checks with Federal Reserve Banks and branches.*—All checks received by State depository postmasters representing surplus postal funds, surplus money-order funds, and receipts from sales of War-Savings securities (except to the extent that surplus postal funds and surplus money-order funds may be required for use by the depository postmaster for authorized postal expenditures,

or the redemption of War-Savings Certificates), whether or not such checks are drawn on banks and trust companies located in the same city with the postmaster, shall be forwarded for deposit each day, unless otherwise specifically instructed, to the Federal Reserve Bank of the district in which the post office is located (or, in case the post office is located in the same city with a branch Federal Reserve Bank, to such branch Federal Reserve Bank.) Specific instructions may be given by the Secretary of the Treasury in certain instances for the deposit of checks with Federal Reserve Banks of other districts, and branches thereof. The postmaster at Washington, D. C., shall make deposits hereunder with the Treasurer of the United States direct. Checks forwarded to the Federal Reserve Bank in accordance herewith must be accompanied by a letter of transmittal or a draft certificate of deposit (to consist of a full set, in proper form, to be signed, dated, and completed by the Federal Reserve Bank), and such letter of transmittal or draft certificate of deposit must, in all cases, make such specification as shall be required of postmasters by the Postmaster General, and by the instructions appearing on the certificate. The depository postmaster should stamp on the face of each check deposited the words, "This check is in payment of an obligation to the United States and must be paid at par. No protest," with his name and title. The Federal Reserve Bank will make an effort to collect every check on these terms. If the bank on which a check is drawn refuses to pay it at par, it will be returned to the postmaster in the same manner as a bad check. All checks forwarded by postmasters to the Federal Reserve Bank should be endorsed:

Pay to the order of the Federal Reserve Bank of .....
(Insert name of city in which Federal Reserve Bank, not branch, is located.)

with appropriate statement showing whether the deposit is made on account of surplus postal funds, surplus money-order funds, or receipts from sales of War-Savings securities. The checks must, in all cases, be forwarded by official registered mail. Inasmuch as the indorsement is specific, it is not necessary that the checks be insured. Postmasters must, however, retain a record of the checks forwarded so that if any checks are lost, payment may be immediately stopped and duplicates secured. When transmitting the checks to the Federal Reserve Bank, the post-

master should request the Federal Reserve Bank to issue a certificate of deposit or the appropriate form in his name, and to make disposition of the certificates in the set in accordance with the instructions which appear on the certificate.

FOR SPECIAL ATTENTION OF OTHER DEPOSITORS OF PUBLIC MONEYS.

16. *Deposit of checks with Federal Reserve Banks and branches.*—All checks received by other depositors of public moneys, whether or not drawn on banks and trust companies in the same city with the depositor, including checks for deposit to the official credit of the depositor with the Treasurer of the United States (other than checks drawn on the Treasurer of the United States for deposit to the official credit of the depositor, which shall be deposited direct with the Treasurer), shall be forwarded for deposit each day, unless otherwise specifically instructed by the Secretary of the Treasury, to the Federal Reserve Bank of the district in which the depositor's head office is located (or, in case the head office is located in the same city with a branch Federal Reserve Bank, to such branch Federal Reserve Bank): *Provided, however,* That depositors located in the District of Columbia shall make deposits hereunder direct with the Treasurer of the United States: *And provided further,* That other depositors may in special cases make deposits hereunder with the Treasurer of the United States direct. Specific instructions may be given by the Secretary of the Treasury in certain instances for the deposit of checks with Federal Reserve Banks of other districts, and branches thereof. Checks forwarded to the Federal Reserve Bank in accordance herewith must be accompanied by a letter of transmittal or a draft certificate of deposit (to consist of a full set, in proper form, to be signed, dated, and completed by the Federal Reserve Bank), and such letter of transmittal or draft certificate of deposit must in all cases make such specification of the deposit as shall be required of the officer making the deposit. The depositor should stamp on the face of each check deposited the words, "This check is in payment of an obligation to the United States and must be paid at par. No protest," with his name and title. The Federal Reserve Bank will make an effort to collect every check on these terms. If

ıe bank on which a check is drawn refuses to pay it at ar, it will be returned to the depositor in the same manner s a bad check. All checks forwarded by the depositor to ıe Federal Reserve Bank should be indorsed:

Pay to the order of the Federal Reserve Bank of .....
nsert name of city in which Federal Reserve Bank, not branch, is located.)

ith appropriate statement showing the specific account or which the deposit is made. The checks must, in all ases, be forwarded by registered mail. Inasmuch as the ndorsement is specific, it is not necessary that the checks e insured. Depositors must, however, retain a record of ıe checks forwarded, so that if any checks are lost payment ay be immediately stopped and duplicates secured. Nec-ssary expenses for postage and registration charges should e borne by such appropriation as may be available, and ıould not in any event be deducted from the amount of the eposit. If the depositor has no appropriation available pay such charges, he should make prompt report of the cts to the Secretary of the Treasury, Division of Public oneys, and request instructions. When transmitting the ıecks to the Federal Reserve Bank, the depositor should equest the Federal Reserve Bank to issue a certificate of eposit on the appropriate form in his name, the certificates the set to be disposed of in accordance with the instruc-ons which appear on the certificate.

17. *For special attention of officers of United States urts and United States attorneys.*—United States attor-eys, marshals, and clerks of United States courts, who re-eive public moneys accruing to the United States from nes, penalties, and forfeitures, fees, costs, forfeitures of ecognizances, moneys arising from unclaimed wages and ffects of seamen that have remained in the registry of the urts for more than six years, unclaimed moneys remain-g in court registry five years or longer, debts due the nited States, interest on such debts, sales of public prop-rty, or from any other sources, except as stated below, ill deposit the same in accordance with the foregoing aragraphs. Moneys collected in cases for violation of ustoms, navigation, equipment of motor boats, steamboat-spection, immigration and Chinese exclusion laws should e paid to the collector of customs in the district or port which the case arose. Fines for importation of opium

or having opium in possession under act of February 9, 1909, amended January 17, 1914, should also be paid to the collector of customs. Moneys collected in criminal cases under the internal revenue laws, including fines for making smoking opium under law of January 17, 1914, or under the anti-narcotic act of December 17, 1914, should be paid to the collector of internal revenue in the district in which the case arose. But fines arising from violation of section 240, Criminal Code, should be deposited by the clerk of court collecting same to the credit of the Treasurer of the United States. Moneys collected as damages on account of trespass on the national forests should be paid to the fiscal agent of the forest service district in which the case arose. Fines and costs should be deposited to the credit of the Treasurer of the United States. Fines collected under sections 52 and 53, Criminal Code (setting fire to timber on public lands or failing to extinguish same), should be paid to the proper county officer for the public school fund of the county where the land is situated. Costs should be deposited to the credit of the Treasurer of the United States. Moneys collected in Indian suits involving rentals, leasing, damages, etc., of Indian property or allotments for use of the particular Indian owners, should be paid to the disbursing officer for the agency having jurisdiction over them. Costs should be deposited to the credit of the Treasurer of the United States. Moneys (including costs) collected in civil or criminal post-office cases should be transmitted to the Solicitor of the Treasury, by draft or check, made payable to the order of the Treasurer of the United States.

FOR SPECIAL ATTENTION OF FEDERAL RESERVE BANKS.

18. *General Provisions.*—Federal Reserve Banks and branches will be expected to remain open during usual banking hours for the purpose of receiving deposits hereunder. Unless and until otherwise instructed by the Secretary of the Treasury, Federal Reserve Banks and branches will not receive deposits by postmasters or other Government officers for credit in their official disbursing accounts maintained elsewhere than with the Treasurer of the United States, nor deposits made by United States courts and their officers, unless for the depositor's credit through the account of the Treasurer of the United States with the Federal Reserve Bank or branch.

19. *Internal revenue checks.*—Federal Reserve Banks are requested, where possible, to give immediate credit in the Treasurer's general account and issue certificate of deposit for the full amount of all checks received from collectors of internal revenue pursuant to this circular. In the event that any checks for which a certificate of deposit has been given are returned to the Federal Reserve Bank as unpaid for any reason, the collector should be promptly notified and the check or checks should be held in suspense for a few days while the collector makes an effort to collect the amount. If he fails to make collection within thirty days, the check or checks should be returned to the collector and his receipt taken therefor, on the reverse of Form N, copy attached. This receipt must show the date, number, and amount of each certificate of deposit in which the amount of the unpaid check (or checks) was included, and the class of the deposit, as Income and Profits Taxes, or Miscellaneous Internal Revenue. The Federal Reserve Bank, upon obtaining such receipt from the collector, will immediately charge the amount, with appropriate description, in its current transcript of the Treasurer's account on Form 17, and forward therewith in support of the entry the receipt given by the collector with a debit voucher, both on Form N, copy attached, a supply of which will be forwarded by the Treasury Department to each Federal Reserve Bank for this purpose. In the event that any checks for which a certificate of deposit has been given are lost after deposit, the collector should be promptly notified and the items held in suspense for not exceeding thirty days while the collector endeavors to have payment on the lost check stopped and to secure another check or cash in lieu of the original check. If the taxpayer refuses or neglects to make prompt payment, the collector will proceed as in the case of a delinquent taxpayer. If at the expiration of thirty days the matter has not been satisfactorily adjusted, the Federal Reserve Bank should make full report to the Secretary of the Treasury, Division of Public Moneys, and request specific instructions before making any charges for the lost item in the Treasurer's account. Checks received from collectors of internal revenue for which the Federal Reserve Bank is not willing to give immediate credit should be credited by the Federal Reserve Bank in a special collection account, for a period not in excess of five days, and when collection has been made or the five-day period has

elapsed, the collection account should be charged and the Treasurer's account credited, and a certificate of deposit should be issued in the usual manner, unless the check has been returned unpaid. If a check deposited in the collection account should be returned unpaid, and no certificate of deposit has been issued therefor, it should be returned to the depositor and the amount charged to the collection account. Federal Reserve Banks are requested to use great care in observing the collector's classification of deposits of internal revenue collections, and in specifying upon the face of certificates of deposit on Form 15 (National Banks) deposits of "Income and Profits Taxes" separate and distinct in each case from deposits of Miscellaneous Internal Revenue Collections (formerly called "Ordinary"). In this connection Federal Reserve Banks will observe that checks forwarded in the separate package marked "Internal Revenue Collections" may contain items in payment of income and profits taxes as well as miscellaneous internal revenue collections.

20. *Customs checks.*—Federal Reserve Banks are requested, where possible, to give immediate credit in the Treasurer's general account and issue certificate of deposit for the full amount of all checks received from collectors of customs pursuant to this circular. In the event that any checks for which a certificate of deposit has been given are returned to the Federal Reserve Bank as unpaid for any reason, the collector should be promptly notified and the check or checks should be held in suspense for a few days while the collector makes an effort to collect the amount. If he fails to make collection within a reasonable time, the check or checks should be returned to the collector and his receipt taken therefor, on the reverse of Form N, copy attached. This receipt must show the date, number, and amount of each certificate of deposit in which the amount of the unpaid check (or checks) was included, and the class of the deposit, as Customs, or the like. The Federal Reserve Bank, upon obtaining such receipt from the collector, will immediately charge the amount, with appropriate description, in its current transcript of the Treasurer's account on Form 17, and forward therewith in support of the entry the receipt given by the collector with a debit voucher, both on Form N, copy attached, a supply of which will be forwarded by the Treasury Department to each Federal Re-

serve Bank for this purpose. In the event that any checks for which a certificate of deposit has been given are lost after deposit, the collector should be promptly notified and the items held in suspense for not exceeding thirty days while the collector endeavors to have payment on the lost check stopped and to secure another check or cash in lieu of the original check. If at the expiration of thirty days the matter has not been satisfactorily adjusted, the Federal Reserve Bank should make full report to the Secretary of the Treasury, Division of Public Moneys, and request specific instructions before making any charges for the lost item in the Treasurer's account. Checks received from collectors of customs for which the Federal Reserve Bank is not willing to give immediate credit should be credited by the Federal Reserve Bank in a special collection account for a period not in excess of five days, and when collection has been made, or the five-day period has elapsed, a certificate of deposit should be issued in the usual manner, unless the check has been returned unpaid. Federal Reserve Banks are requested to use great care in observing the collector's classification of deposits of Customs collections, and in specifying upon the face of certificates of deposit on Form 1¾ (National Banks) deposits representing collections for the Treasury Department, Department of Commerce, and Department of Labor, separate and distinct from each other, and to make such further specification within each department as may be indicated by the collector.

21. *Other checks.*—Federal Reserve Banks are requested, where possible, to give immediate credit in the Treasurer's general account and issue certificate of deposit for the full amount of all other checks received from depositors of public moneys pursuant to this circular. In the event that any checks for which a certificate of deposit has been given are returned to the Federal Reserve Bank as unpaid for any reason, or are lost after deposit, the depositor should be promptly notified and the item or items should be held in suspense for not exceeding thirty days while the depositor makes an effort to collect the amount. If he fails to make collection within this time, the Federal Reserve Bank should make full report to the Secretary of the Treasury, Division of Public Moneys, and request specific instructions. The Federal Reserve Bank will not, without further authority therefore, charge

the Treasurer's account with the amount of such checks. Checks received from such depositors for which the Federal Reserve Bank is not willing to give immediate credit should be credited by the Federal Reserve Bank in a special collection account, for a period not in excess of five days, and when collection has been made or the five-day period has elapsed, a certificate of deposit should be issued in the usual manner, unless the check has been returned unpaid. Federal Reserve Banks are requested to use great care in observing the depositor's classification of deposits, and in specifying the classes of deposits upon the face of certificates of deposit on the appropriate form.

22. *Checks drawn on banks outside district.*—Checks received by Federal Reserve Banks in accordance with this circular which are drawn on banks in other Federal Reserve districts should be collected in the usual manner and should not be charged in the Treasurer's general account as transfers of funds to other Federal Reserve Banks.

FOR SPECIAL ATTENTION OF ASSISTANT TREASURERS OF THE UNITED STATES.

23. Collectors of internal revenue, collectors of customs, and depository postmasters are not authorized to make deposits hereunder with Assistant Treasurers of the United States. Inasmuch as there is a Federal Reserve Bank or branch located in every city except Washington in which an Assistant Treasurer is located, it is expected that so far as possible all deposits of public moneys will be made with the Federal Banks or branches rather than with Assistant Treasurers. Deposits on account of the five per cent redemption funds shall be made until further notice, with the Treasurer or an Assistant Treasurer of the United States.

FOR SPECIAL ATTENTION OF NATIONAL BANK DEPOSITARIES.

24. *General provisions.*—National bank depositaries are not authorized to maintain any collection account for deposits of public moneys, but are required to give immediate credit in the Treasurer's account and to issue certificate of deposit for the full amount of all public moneys deposited with them for credit in the Treasurer's account in accordance with this circular. Except pursuant to specific instruc-

tions to that effect from the Secretary of the Treasury, no deposits of checks will be made hereunder with National bank depositaries for credit to the account of the Treasurer of the United States.

25. *Excess balances.*—National bank depositaries, whenever they hold funds to the credit of the Treasurer of the United States in excess of the authorized balance, shall make immediate transfer of such excess funds to the Treasurer or an Assistant Treasurer of the United States, or to the Federal Reserve Bank of the district, or, in special cases, to branches of Federal Reserve Banks. National bank depositaries, whenever they hold funds to the credit of other Government officers, pursuant to paragraph 27 hereof, in excess of the collateral value of the security deposited therefor, shall promptly report the facts to the Secretary of the Treasury, Division of Public Moneys, and deposit additional security to cover such deposits.

26. *Collateral security for deposits with regular National bank depositaries.*—From the date of this circular, and until further notice, securities of the following classes, and no others, will be accepted as security for deposits of public moneys with regular National bank depositaries, and at the rates below provided:

(a) Bonds, notes and Treasury certificates of indebtedness of the United States, of any issue, including outstanding interim certificates or receipts for payments therefor; all at par.

(b) Bonds of the Federal Land Banks, bonds of the War Finance Corporation, bonds of Porto Rico and the District of Columbia, and bonds and certificates of indebtedness of the Philippine Islands; all at par.

(c) The 3½ per cent bonds of the Territory of Hawaii at 90 per cent of market value; and other bonds of said Territory at market value, not to exceed par.

All securities to be deposited as collateral security for such deposits must be deposited with the Treasurer of the United States. On or before June 30, 1920, National bank depositaries will be required to substitute securities of the classes above described for all securities not falling within said classes deposited with the Treasurer of the United States as security for such deposits.

27. *Court and post-office funds, etc.*—National bank depositaries designated with a maximum qualification for the sole purpose of receiving deposits made by United States courts and their officers, by postmasters for credit to their official disbursing accounts, and by other Government officers authorized to maintain disbursing accounts elsewhere than with the Treasurer of the United States are not authorized to receive deposits for credit to the account of the Treasurer of the United States. Such depositaries are required to forward to the Treasurer of the United States at the end of each week, and at the end of each month, a report on Form 17 (National Banks), showing the aggregate amounts of such deposits, and to the Secretary of the Treasury, Division of Public Moneys, at the end of each week, and at the end of each month, a report on Form 7 (National Banks), showing in detail the deposits to the credit of the local postmaster, the United States court or its officers, and other authorized special accounts. Bankruptcy funds and postal savings deposits should not be included in these reports.

28. *Interest on deposits.*—Each National bank depositary will be required to pay interest at the rate of 2 per cent per annum on daily balances, including deposits received pursuant to paragraph 27 hereof. Interest will be calculated on an actual day's basis, and shall be paid semiannually on January 1 and July 1 in each year, 1 per cent for each six-months' period.

PAYMENT OF GOVERNMENT WARRANTS AND CHECKS.

29. *Federal Reserve Banks and branches.*—Federal Reserve Banks and branches shall make arrangements to cash Government warrants and checks drawn on the Treasurer of the United States for disbursing officers of the War Department and Navy Department, and other Government officers, provided that satisfactory identification of the officer shall be furnished. The Treasurer will upon special request advise Federal Reserve Banks and branches as to the balances to the credit of such officers. Each Federal Reserve Bank and branch will cash Government warrants and checks drawn on the Treasurer of the United States when they are presented and properly indorsed by responsible incorporated banks and trust companies who guarantee all prior indorsements thereon, including the indorse-

ment of the drawer when the check is drawn in his favor. Warrants and checks cashed by Federal Reserve Banks and branches shall be charged to the account of the Treasurer of the United States, subject to examination and payment by the Treasurer. Federal Reserve Banks and branches will not be expected to cash Government warrants and checks presented direct to the bank by the general public.

30. *National bank depositaries and Assistant Treasurers.*—Each regular National bank depositary with an authorized balance to the credit of the Treasurer of the United States, and each Assistant Treasurer of the United States will cash Government warrants and checks drawn on the Treasurer of the United States when they are presented and properly indorsed by responsible holders who guarantee all prior indorsements thereon, including the indorsement of the drawer when the check is drawn in his favor. Warrants and checks so cashed by Assistant Treasurers shall be charged to the account of the Treasurer of the United States, subject to examination and payment thereof by the Treasurer. Regular National bank depositaries are not required to charge Government warrants and checks cashed by them in the account of the Treasurer of the United States, except in cases where checks drawn on the Treasurer of the United States are deposited for the official credit of the drawer or the credit of other Government officers in the account of the Treasurer of the United States and in cases where cash is furnished to a Government officer upon the warrant or check for pay-roll or other expenditures.

31. *Payment by Treasurer.*—The Treasurer of the United States reserves the usual right of the drawee to examine, when received, all Government warrants and checks cashed by Assistant Treasurers, Federal Reserve Banks and branches, and National bank depositaries, and to refuse payment thereon. Three years after the close of the fiscal year (June 30) in which they are drawn, warrants and disbursing officer's checks are *not* payable by the Treasurer of the United States, but should be sent to the Secretary of the Treasury, Division of Public Moneys, for payment from the "Outstanding liabilities" appropriation.

OTHER PROVISIONS.

32. All previous regulations and instructions inconsistent herewith are hereby superseded, including, so far as inconsistent herewith, the provisions of Treasury Department Circulars No. 5, dated April 6, 1916, No. 105, dated December 27, 1917, and No. 144, dated May 20, 1919.

33. Except as herein otherwise specifically provided, nothing contained in this circular shall be deemed to affect deposits by postmasters to the credit of their official disbursing accounts, the deposit of court funds by United States courts and their officers, or the deposit of Postal Savings funds, in cases where such deposits are not for credit by the depositary in the account of the Treasurer of the United States. Unless specifically extended thereto by the Secretary of the Treasury, nothing contained in this circular shall be deemed to apply to or govern the deposit of public moneys in Federal land banks or joint stock land banks under the act approved July 17, 1916, as amended.

34. The provisions of this circular do not apply to or govern the deposit of public moneys or the payment of Government warrants and checks outside of the continental United States, except to the extent specifically extended by the Secretary of the Treasury from time to time.

35. The Secretary of the Treasury may withdraw or amend at any time or from time to time any or all of the provisions of this circular.

CARTER GLASS,
Secretary of the Treasury.

Form N.

[Obverse.]

Group as paid checks.	First sort General ledger section.	Second sort Symbol .....

Treasurer's office. DEBIT VOUCHER. Form N.

....., 192..

..... of .....
(Name of Federal Reserve Bank or branch.)

Debit has been made this day in transcript of Treasurer's general account for uncollectible checks deposited by ..... in payment of ..... and returned to the depositor as unpaid, as per receipt on reverse hereof, in the amount of $.....

.....
Cashier.

NOTE.—Forward with transcript in support of entry.

[Reverse.]

Received ....., 192.., from .....
(Name of Federal Reserve Bank or branch.)

of ....., uncollectible checks amounting to $....., which amount was included in certificates of deposit issued by said bank as follows:

Certificate No.	Date of certificate	Total amount of certificate.	Classification of deposit (as income and profits taxes, miscellaneous internal revenue, customs, miscellaneous receipts, official checking account, surplus postal funds, surplus money-order funds, War-Savings securities, etc.).	Amount of uncollectible checks included in each certificate.

Total, $.....

.....
(Name and title of depositor.)

..... District of .....

April 4, 1913.

President,
District National Bank,
Washington, D. C.

Sir:

By direction of the Secretary the designation of your bank is hereby changed from that of a temporary depositary to a depositary for regular purposes and your authorized balance will be fixed at $50,000 to be secured by a sufficient amount of any U. S. bonds, Philippine, Porto Rican, District of Columbia, Hawaiian, Philippine Railway Company and Manila Railroad Company bonds which you will forward to the Treasurer of the United States.

Respectfully,

JNO. SKELTON WILLIAMS,
Assistant Secretary.

EBS

COPY

November 15, 1917.

Cashier,
District National Bank,
Washington, D. C.

Sir:

By authority conferred upon the Secretary of the Treasury by the Act of September 24, 1917, the District National Bank, Washington, D. C., is hereby designated as a special depositary of public moneys, and under this designation is authorized to receive only deposits on account of its purchase of Treasury certificates of indebtedness and subscription payments for Liberty Loan bonds. Such deposits as may be made with your bank from time to time shall not exceed in the aggregate at any one time $300,000.

A "War Loan Deposit Account" should be opened on the books of your bank and all moneys deposited thereunder should be credited to "The Federal Reserve Bank of Richmond, Fiscal Agent of the United States."

Details as to the method of handling this account will be ade known to you by the Federal Reserve Bank of your strict.

By direction of the Secretary.

Respectfully

(Signed) R. C. LEFFINGWELL,
Assistant Secretary.

March 24, 1920

COPY

ashier,
istrict National Bank,
Vashington, D. C.

ear Sir:

The Government is borrowing on Treasury certificates indebtedness at rates of interest varying from 4¼% to ¼%. The Treasury, therefore, has no surplus funds to ave with National bank depositaries at 2% interest, ex- pt where it is necessary to maintain balances with such epositaries for the performance of some essential Gov- nment business. Having discontinued all national bank epositaries in cities where Federal Reserve Banks and anch Federal Reserve Banks are located and equipped transact the Government's business, the Treasury feels at it must, as a measure of consistency and of adminis- ative economy, discontinue national bank depositaries in e city of Washington where the office of the Treasurer of e United States is located.

You will, accordingly, please transfer on or before arch 31st to the Treasurer of the United States all funds deposit with your bank to the credit of the Treasurer's eneral Account, and from that date you will accept no posits to the credit of that account.

After the transfer of funds has been made as directed, u should forward to this office and to the Treasurer of e United States a final transcript reporting the transfer have been made. There should be attached to the tran- ript furnished this office a statement sworn to by the esident and Cashier of your bank to the effect that:

"The balance above reported as transferred comprised the entire indebtedness of this bank for public moneys on deposit to the credit of the Treasurer of the United States."

If your bank has on deposit any funds to the credit of other Government officers than the Treasurer of the United States, excluding bankruptcy funds and postal savings funds, please advise, this office immediately and you will be instructed as to the disposition of those funds.

Upon payment of the interest due and the receipt by the Treasurer of the United States of a Resolution of your Board of Directors authorizing the withdrawal and disposition of the collateral now lodged with the Treasurer to secure the public deposit, together with his receipt which you now hold for said collateral, the securities in question will be released and the District National Bank of Washington, D. C. discontinued as a depositary of public moneys.

The above discontinuance, however, does not affect the designation of your bank as a special depositary under the provisions of Department Circular No. 92.

By direction of the Secretary.

Respectfully,

(Signed) R. C. LEFFINGWELL,
Assistant Secretary of the Treasury.

EDB/cp

COPY

November 5, 1920.

H. L. Offutt, Jr., Esquire,
Cashier, District National Bank,
Washington, D. C.

Dear Sir:

I received your letter of October 30th, and have also been advised by the Treasurer of the United States of the deposit by your bank of Liberty Bonds in the sum of $5,000.

Accordingly, the District National Bank, of Washington, D. C., has been designated a limited depositary of public moneys with authority to hold not to exceed $5,000 of funds to the credit of the United States Marshal. This account should be reported to the Division of Deposits on Form 7 on Saturday of each week and on Line 12, Form 17, to the Treasurer of the United States on Saturday of each week and on the last day of the month. The necessary supply of forms, upon which to render reports, has been forwarded to you under separate cover.

Your attention is especially called to paragraphs 25, 26, 27 and 28 of Department Circular No. 176, copy enclosed, which indicate the requirements of the Treasury as to the handling of the account in question.

Very truly yours,

(Signed) R. A. CROXTON,
Chief, Division of Deposits.

Enclosure (1)
EDB/lt

January 23, 1930.

H. L. Offutt, Jr., Esq.,
Cashier, District National Bank,
Washington, D. C.

Dear Sir:

The District National Bank, Washington, D. C., has been discontinued as a limited depositary of public moneys, effective January 31, 1930, inasmuch as that bank has not during recent years maintained an active account under this designation.

In order that the collateral now deposited with the Treasurer of the United States as security for Goverment accounts formerly maintained on your books may be released, you should execute the enclosed resolution and forward it to the office of the Treasurer of the United States, Division of Securities, accompanied by Treasurer's receipts covering the collateral to be withdrawn.

It is noted that your bank is reporting to this office on Form 7 the balance of the "Comptroller of the Currency, Unclaimed Dividends, Insolvent National Banks". The discontinuance of your bank as a limited depositary does

not affect that account and it is not necessary for you to report to this office.

By direction of the Secretary:

Very truly yours,

(Signed) E. D. BATCHELDER,
Chief, Division of Deposits

(1 enclosure)

October 21, 1933.

Cashier,
District National Bank,
Washington, D. C.

Dear Sir:

The designation of the District National Bank of Washington, D. C., as a special depositary of public moneys under the Act of Congress approved September 24, 1917, as amended, and in accordance with the provisions of Treasury Circular No. 92, revised February 23, 1932, as supplemented, has been canceled, inasmuch as the bank has been taken over by the Hamilton National Bank, Washington, D. C.

By direction of the Secretary:

Very truly yours,

(Signed) E. D. BATCHELDER,
Chief, Division of Deposits.

Comptroller Tracewell's Decision, 11 C. D. 36.

CONSTRUCTION OF ACTS OF CONGRESS RELATIVE TO THE BUILDING OF THE PANAMA CANAL.

The provision in section 87 of the act of January 12, 1895, requiring all printing for the executive and judicial departments to be done at the Government Printing Office has no application to printing for the Isthmian Canal Commission.

Under the power conferred upon him by the act of June 28, 1902, the President is authorized to rent offices in the District of Columbia for the use of the Isthmian Canal Commission, notwithstanding the provision in the act of

March 3, 1877, that no contract should be made for the rent of any building, or part of building, in the District of Columbia unless appropriated for in terms.

The allotment or assignment of pay by employees of the Isthmian Canal Commission is not authorized.

The provision in section 3709, Revised Statutes, relative to advertising for supplies and the letting of contracts is applicable to work done in connection with the construction of the canal.

The local revenues of the Isthmian Canal Zone are not such moneys as are required to be accounted for to the Treasury Department, but said revenues are to be accounted for in such manner and under such rules and regulations as the President and the Canal Commission shall prescribe, a report of the same being made to the President and to Congress, as required by the act of June 28, 1902.

(COMPTROLLER TRACEWELL TO THE CHAIRMAN OF THE ISTHMIAN CANAL COMMISSION, JULY 26, 1904.)

I have received your letter of the 1st instant, wherein you say:

"After conference with the Secretary of War with reference to future disbursements under the direction of this Commission, I respectfully request that you give a decision upon the following points:

"(1) In conducting the various branches of work, large quantities of printed books and blanks will be required for use in the Commission's main and subsidiary offices on the Isthmus. Does the fact that a portion of these will also be used in the Washington branch office require them to be obtained from the Government Printing Office, under section 87, act of January 12, 1895?

"(2) Does the act of June 28, 1902, authorize rent of offices in the District of Columbia within the meaning of the act of March 3, 1877? (19 Stat., 370.)

"(3) In case of the adoption by the Commission of a system of allotting pay, by employees on the Isthmus, similar to that in use in the Navy, would the treasurer of the Commission be authorized to pay allotments as made?

"(4) Is the Commission required to advertise for bids for supplies for use on the Isthmus, or in its branch office

at Washington, in accordance with section 3709, Revised Statutes?

"(5) Attention is invited to the last paragraph, page 8, of the President's letter of May 9, 1904, addressed to the Secretary of War (copy herewith), which states:

"'The necessary expenses incurred by the Commission in carrying on the government of the Canal Zone will be defrayed from the local revenues as far as the said revenues may be sufficient, and the remainder will be met from the appropriation made by the fifth section of the act of Congress approved June 28, 1902.'

"Are the revenues from the government of the Canal Zone public moneys of the United States? And should the receipts and disbursements of the same be accounted for to the Treasury Department?"

The questions presented by you will be answered in the order named.

1. By section 87 of the act of January 12, 1895 (28 Stat., 622), it is provided that

> "All printing, binding, and blank books for the Senate or House of Representatives and for the Executive and Judicial Departments shall be done at the Government Printing Office except in cases otherwise provided by law."

It can not be said that the Isthmian Canal Commission is an executive department of the Government within the meaning of the act just quoted. Nor is it a branch or bureau of any of the Executive Departments, although, for administrative purposes, it has been placed under the supervision of the Secretary of War by the President in his letter of May 9, 1904. It is a separate and distinct establishment authorized and created by Congress for the performance of certain work and appropriation made for its necessary expenses. The War Department is not required to furnish, or cause to be done, such printing or binding or books as may be necessary for the use of the Commission, and such printing or binding or books as are furnished for use of the Commission could not therefore be regarded as being furnished for the War Department or any of its bureaus.

m therefore of opinion that the provisions of section
ove quoted do not apply to the printing to be done
our Commission, even though part of said work is to
ed at your branch office in Washington. (See MS.
vol. 29, p. 567; 10 Comp. Dec., 368; 3 Comp. Dec., 127;
lecision of May 11, 1904, addressed to Col. Charles H.
ple, chief disbursing officer of the War College.)

In answer to your second question, it may be stated as
eral proposition that the laws of the United States
to the use and disbursement of the money appropri-
by Congress for building the canal, unless the provi-
of the later statutes relating to the canal are re-
ant to the earlier general laws, in which event, of
e, the earlier laws must give way to the later ones.

e act of March 3, 1877 (19 Stat., 370), provides:

"* * * hereafter no contract shall be made for the
ent of any building, or part of any building, to be
sed for the purposes of the Government in the Dis-
rict of Columbia, until an appropriation therefor
hall have been made in terms by Congress, and that
his clause be regarded as notice to all contractors or
essors of any such building or any part of building."

is act is plain and unambiguous, and would prevent
enting of any building or part thereof in the District
lumbia for the use of the Commission, unless author-
erefore can be found in later acts.
tion 7 of the act of June 28, 1902 (32 Stat., 483-484)
des:

"The President shall cause to be provided and as-
igned for the use of the Commission such offices as
nay, with the suitable equipment of the same, be nec-
ssary and proper, in his discretion, for the proper dis-
harge of the duties thereof."

is act vests in the President, a discretion, without lim-
n, to provide proper and necessary offices for the use
e Commission. To hold that the act of March 3, 1877,
, applies to the renting of offices for the Commission
e District of Columbia, would be to say that said act
impose a limitation on the discretion of the President,

which is not found in the act of June 28, 1902, supra. The discretion there vested in the President is thus repugnant to the provisions of the act of 1877, and therefore the former act must yield to that of 1902.

Because of this I conclude that the President is authorized to cause the renting of offices for the use of the Commission in the District of Columbia, if he chooses to do so.

3. In answer to your third question, as to the authority of employees of the Commission to allot or assign their pay, and the treasurer of the Commission to pay the same to the allottee or assignee, I have to say that such a practice seems to be in contravention of section 3477 of the Revised Statutes, and I find nothing in the law relating to the Canal Commission which would take the case out of the operation of said section.

Therefore I am of the opinion there is no authority to allot or assign the pay in question.

4. In answer to your fourth question, I have to say that I find nothing in the laws relating to the canal which would appear to supersede the provisions of section 3709, Revised Statutes, in regard to advertising for supplies and the letting of contracts for the work to be done on the canal. Therefore the provisions of said section apply to the work done on the canal. Even if there were doubts on this point, such doubts would be set at rest by the following paragraph in the letter of the President of May 9, 1904, so far at least as engineering and construction work is concerned:

> "To make and cause to be executed, after due advertisement, all necessary contracts for any and all kinds of engineering and construction work."

5. Your question five is more difficult of solution. The instructions of the President stated by you relate to the carrying on of the government of the Canal Zone and the use of the *local revenues* of said zone. It is not wholly clear just what was meant by the words "local revenues of the zone." It would seem, however, that what was contemplated were moneys derived from the various sources of taxation, etc., local to the zone, as distinguished from miscellaneous receipts which might be collected as incident to the direct operation of building the canal and the use of a Congressional appropriation. I believe this is the correct

construction of the language used by the President, and the answer will be predicated upon that view.

Article 2 of the treaty with the Republic of Panama proclaimed by the President of the United States February 26, 1904, provides:

> "The Republic of Panama grants to the United States, in perpetuity, the use, occupation, and control of a zone of land and land under water, for the construction, maintenance, operation, sanitation, and protection of said canal, of the width of ten miles, extending to the distance of five miles on each side of the center line of the line of the canal to be constructed. * * *"

Article 3 of the same treaty provides:

> "The Republic of Panama grants to the United States all the rights, power, and authority within the zone mentioned and described in article 2 of this agreement and within the limits of all auxiliary lands and waters mentioned and described in said article 2, which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located, to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power, or authority."

The United States has thus become vested in perpetuity with the use, occupation, and control of the Canal Zone, and is now authorized to exercise all the sovereign powers in and over said zone which were inherent in the Republic of Panama prior to the release, waiver, and transfer thereof to the United States by the terms of the treaty.

Section 2 of the act of April 28, 1904 (33 Stat., 429), provides:

> "That until the expiration of the Fifty-eighth Congress, unless provision for the temporary government of the Canal Zone be sooner made by Congress, all the military, civil and judicial powers as well as the power to make all rules and regulations necessary for the government of the Canal Zone, and all the rights, powers, and authority granted by the terms of said treaty to the United States shall be vested in such person or persons and shall be exercised in such manner as the

President shall direct for the government of said Zone and maintaining and protecting the inhabitants thereof in the free enjoyment of their liberty, property, and religion."

By the terms of this section Congress has for the time being specifically authorized and directed that all the rights, powers, and authority which accrued to the United States under the treaty in question be vested in and exercised by the President and such persons as he may select. No restrictions or limitations are imposed, and until Congress, by express legislation, shall have prescribed the form of government of said Zone, the will and sound discretion of the President and his Commission will control, subject only to the general spirit and purpose of the Constitution of the United States.

It must be borne in mind that Congress has not by any specific act extended the application of the Constitution and statutes of the United States to said territory. Some legislation must first be had to that effect before they can be made fully applicable to the Canal Zone.

In the case of *Downes* v. *Bidwell* (182 U. S., 244), the court said, quoting from the syllabus:

"Every function of the Government being thus derived from the Constitution, it follows that that instrument is everywhere and at all times potential in so far as its provisions are applicable."

The meaning of these words is, as I understand it, that the general spirit and purpose of the Constitution would be applicable in the Canal Zone.

In his concurring opinion in the case of *Downes* v. *Bidwell,* Mr. Justice Gray said:

"The civil government of the United States can not extend immediately, and of its own force, over territory acquired by war. Such territory must necessarily, in the first instance, be governed by the military power under the control of the President as commander in chief. Civil government can not take effect at once, as soon as possession is acquired under military authority, or even as soon as that possession is confirmed by treaty. It can only be put in operation by the

action of the appropriate political department of the Government, at such time and in such degree as that department may determine. There must, of necessity, be a transition period.

"In a conquered territory, civil government must take effect either by the action of the treaty-making power, or by that of the Congress of the United States.

• • • • • • •

"So long as Congress has not incorporated the territory into the United States, neither military occupation nor cession by treaty makes the conquered territory domestic territory, in the sense of the revenue laws. But those laws concerning 'foreign countries' remain applicable to the conquered territory until changed by Congress. Such was the unanimous opinion of this court, as declared by Chief Justice Taney, in *Fleming* v. *Page*, 9 Howard, 603, 617.

"If Congress is not ready to construct a complete government for the conquered territory, it may establish a temporary government which is not subject to *all* the restrictions of the Constitution."

It would seem from the logic of this decision that the local government of the Canal Zone must be vested in the President and the Commission mentioned, and that said zone is not a part of the United States within the full meaning of the Constitution and laws of the country. The local revenues of said zone must therefore be handled in accordance with such rules and regulations as the President and the Commission may authorize. It does not seem necessary to decide whether those revenues are, in a general sense, moneys of the United States, because I am of opinion that they are not such moneys of the United States as are required to be accounted for to the Treasury Department, but that the accounting for said *local* revenues must be done under such rules and regulations as the President and the Commission shall prescribe, a report of the same being made to the President and to Congress, as required by the act of June 28, 1902. (33 Stat., 483.)

Executive Order of Jan. 27, 1914.

To Establish a Permanent Organization for the Panama Canal.

By virtue of the authority vested in me, I hereby enact the following order, creating a permanent organization for the Panama Canal, under the Act of Congress "To provide for the opening, maintenance, protection and operation of the Panama Canal and the sanitation and government of the Canal Zone," approved August 24, 1912.

Section 1. The organization for the completion, maintenance, operation, government and sanitation of the Panama Canal and its adjuncts and the government of the Canal Zone shall consist of the following departments, offices and agencies, and such others as may be established by the Governor of the Panama Canal on the Isthmus or elsewhere with the approval of the President, all to be under the direction of the Governor, subject to the supervision of the Secretary of War.

Department of Operation and Maintenance.

There shall be a Department of Operation and Maintenance under the immediate supervision and direction of the Governor of the Panama Canal. This Department shall be charged with the construction of the Canal and with its operation and maintenance when completed, including all matters relating to traffic of the Canal and its adjuncts, and the operation and maintenance of beacons, lights and lighthouses; the supervision of ports and waterways, including pilotage; the admeasuring and inspecting of vessels, including hulls and boilers; the operation and maintenance of the Panama Railroad upon the Isthmus, including telephone and telegraph systems; the operation of locks, coaling plants, shops, dry-docks and wharves; office engineering, including meteorology and hydrography; the construction of buildings and sanitary and municipal engineering, including the construction and maintenance of drainage ditches, streets, roads and bridges.

Purchasing Department.

There shall be a Purchasing Department under the supervision and direction of the Governor. This department shall be charged with the purchase of all supplies, machinery or necessary plant.

Supply Department.

There shall be a Supply Department, under the supervision and direction of the Chief Quartermaster. This department shall store and distribute all material and supplies for use of the Panama Canal and of its employees; and for other departments of the Government on the Isthmus and their employees; and for vessels of the United States and for other vessels, when required. The Supply Department shall operate commissaries, hotels and messes; shall be in charge of the maintenance of buildings, the assignment of quarters and the care of grounds; shall recruit and distribute unskilled labor; and shall have charge of the necessary animal transportation.

Accounting Department.

There shall be an Accounting Department under the supervision and direction of the Auditor, with an assistant in the United States. The duties of the department shall include all general bookkeeping, auditing and accounting, both for money and property, costkeeping, the examination of payrolls and vouchers, the inspection of time books and of money and property accounts, the preparation of statistical data, and the administrative examination of such accounts as are required to be submitted to the United States Treasury Department; and the collection, custody and disbursement of funds for the Panama Canal and the Canal Zone. These same duties shall be performed for the Panama Railroad Company on the Isthmus when not inconsistent with the charter and by-laws of that Company. The department shall be charged with the handling of claims for compensation on account of personal injuries and of claims for damages to vessels. Within the limits fixed by law, the duties and financial responsibilities of the officers and employees charged with the receipt, custody, disbursement, auditing and accounting for funds and property shall be prescribed in regulations issued by the Governor, with the approval of the President. The Auditor shall maintain such a system of bookkeeping as will enable him to furnish at any time full, complete and correct information in regard to the status of appropriations made by Congress, the status of all other funds, and the amounts of net profits on all operations, which are to be covered into the Treasury as required by the Panama Canal Act.

Health Department.

There shall be a Health Department under the supervision and direction of the Chief Health Officer. This department shall be charged with all matters relating to maritime sanitation and quarantine in the ports and waters of the Canal Zone and in the harbors of the cities of Panama and Colon, and with land sanitation in the Canal Zone, and sanitary matters in said cities in conformity with the Canal Treaty between the United States and the Republic of Panama and existing agreements between the two governments thereunder, and all matters relating to hospitals and charities.

Executive Secretary.

There shall be an Executive Secretary who, under the direction of the Governor of the Panama Canal, shall be charged with the supervision of all matters relating to the keeping of time of employees; to postoffices, customs, taxes and excises, excepting the collection thereof; police and prisons, fire protection; land office; schools, clubs and law library; the custody of files and records; and the administration of estates of deceased and insane employees. He shall, in person or through one of his assistants, perform the duties of a Shipping Commissioner. He shall conduct all correspondence and communications between the authorities of the Canal Zone and the Government of the Republic of Panama and such other correspondence as may be given him in charge by the Governor. He shall have charge of the seal of the Government of the Canal Zone and shall attest such acts of the Government as are required by law to be performed and done under the seal.

The duties herein prescribed for the foregoing departments, offices and agencies will be assigned to divisions or bureaus thereunder by the Governor of the Panama Canal, as the necessities therefor arise. Each of the foregoing departments shall discharge such further duties as may be assigned to it from time to time by the Governor; and the Governor, with the approval of the President, may transfer from time to time specific duties from one department to another.

Section 2. The organization provided for in Section 1 shall be, in general, in accordance with the outline chart accompanying the memorandum of Jan. 27, 1914, entitled "Memorandum to accompany Executive Order of Jan. 27,

1914, providing for a permanent organization for the Panama Canal," and officers from certain departments shall be detailed in accordance with that memorandum.

Section 3. This order shall take effect from and after the 1st day of April, 1914, from which date the Isthmian Canal Commission, together with the present organization for the Panama Canal and the Canal Zone, shall cease to exist, in accordance with the terms of the above-mentioned Act of Congress.

WOODROW WILSON.

The White House,
January 27, 1914.

The Canal Record.
Official Publication of The Panama Canal
Volume VII.—No. 38.
August 27, 1913 to August 19, 1914.
Page 365.

Official Circulars.
Accounting Department.
The Panama Canal.
Office of the Governor.
Culebra, C. Z., April 1, 1914.

Circular #660-2:

Auditor of the Panama Canal.

1. The Auditor of The Panama Canal is charged with the immediate direction and control of accounting, and the auditing and settlement of claims for The Panama Canal and Canal Zone and for the Commissary Department of The Panama Railroad on the Isthmus. He has supervision and control over the acceptance of bonds, the methods of keeping records and accounts of receipts and disbursements of moneys received by all officers and agents of The Panama Canal and Canal Zone by virtue of their officers or positions, and the methods of safeguarding such moneys. He shall prescribe all forms for recording the receipt and disbursement of moneys and property and all forms necessary for use in accounting for money and property, except as otherwise prescribed in accordance with law. He is authorized, and it shall be his duty, to examine the books, contracts, rec-

ords, and accounts of money and property in the possession of all officers and agents of The Panama Canal and Canal Zone, and of the Commissary Department of the Panama Railroad on the Isthmus. He shall perform all the duties heretofore assigned to the Examiner of Accounts or to the Auditor of the Canal Zone Government, and the additional duties prescribed by the Executive Order of January 27, 1914.

Disbursements—Paymaster

2. The Paymaster is charged with the payment on the Isthmus of all moneys appropriated for The Panama Canal and expendable under the direction of the Governor. The Paymaster will make payments only on vouchers or pay rolls, time vouchers or pay receipts which have been examined and audited by the Auditor. All collections made by the Paymaster on the pay rolls shall be paid by him to the Collector upon the certificate of the Auditor specifying the amount and the source from which derived, except refundments of overpayments and amounts due The Panama Railroad Company for supplies or services rendered employees, and except other deductions authorized to be made and to be paid to other branches of the service, to contractors or other persons. All other duties performed by the Disbursing Officer of the Isthmian Canal Commission prior to April 1, 1914, will be performed by the Collector.

Receipts—Collector

3. The Collector shall perform all duties heretofore performed by the Treasurer of the Canal Zone and, in addition, shall collect or receive all amounts due The Panama Canal and Canal Zone. He shall transfer all cash received by him and not required for the performance of his duties, to the Paymaster. For the funds of The Panama Canal, he shall take the Paymaster's receipts; for Canal Zone, money order, postal savings bank, clubhouse, and other trust funds and security deposits, he shall take the draft of the Paymaster on the Treasurer of the United States and shall deposit same in depositories under the contracts entered into by the Secretary of War. He shall have such number of deputies or assistants as may be assigned to him. All moneys, records, and papers of the Treasurer of the Canal Zone, and all moneys, records, and papers of the Collector

of Revenues and his deputies, insofar as they relate to the collection of moneys, shall be transferred to the Collector of The Panama Canal.

4. The Collector will render an account for all public moneys of the United States received by him to the Auditor for the War Department, through the Auditor of The Panama Canal. The account will be forwarded to the Auditor of The Panama Canal within ten days after the close of each month, and will be forwarded by the Auditor of The Panama Canal to the Auditor for the War Department within ten days thereafter.

5. All amounts due The Panama Canal or Canal Zone will be collected by the Collector or his deputies whenever practicable. Bonded employees of the various departments and divisions designated by the Auditor may make collections for minor services or sales. In the performance of their duties in connection with receiving, handling, and refunding cash, such employees shall be subject to the direction of the Auditor. Such bonded employees shall issue receipts in triplicate, giving the original to the party making deposit and sending the duplicate to the Auditor.

6. All collections for The Panama Canal or Canal Zone will be remitted to the Collector, The Panama Canal.

7. Remittances should be made to the Collector at least once each week, and when the cash on hand amounts to $50, except that the retention of a larger balance may be specifically authorized by the Auditor.

8. All funds shall be remitted by registered mail with the original copy of remittance letter, the duplicate thereof being retained by the remitter. Receipt in favor of the remitter will be issued by the Collector as soon as a remittance is received.

9. All amounts greater than $50 deposited as security for the payment of supplies or rendition of services will be deposited with the Collector or his Deputies.

10. The Collector shall have the custody and issue, upon requisition approved by the Auditor, of coupon books, meal tickets, stamps, and similar money values.

11. All checks, drafts, money orders, or any form of remittance, except cash, should be made payable to "Collector,

The Panama Canal", and if otherwise made payable should be endorsed in his favor.

12. Monthly abstracts covering all receipts, remittances, all refunds, in detail, will be prepared and forwarded to the Auditor of The Panama Canal promptly at the close of each month, supported by all receipts issued or taken. Forms of such abstracts have been prepared and will be furnished all collecting officers, with full information, prior to the time it is necessary to render April accounts.

Responsibility of Employes.

13. All pay rolls, time vouchers, and pay receipts, and all vouchers and claims, bills, and accounts receivable of all kinds shall be examined, and audited and checked against the proper records, contracts, or other authorizations in the auditing divisions of the Accounting Department, and otherwise completed with the proper papers attached, prior to submission to the Collector or Paymaster for collection or payment.

14. Two signed copies of all contracts relating to the disbursement of public moneys will be forwarded to the Auditor as soon as executed, one for his office, and one for transmittal to the Auditor for the War Department.

15. All employes of The Panama Canal who examine, check, and verify the correctness and validity of pay rolls, time vouchers, and pay receipts, vouchers and claims, bills or accounts receivable, or any paper or record authorizing or necessary to support any collection or payment, shall be financially responsible for errors of calculation and any other errors apparent upon the face of the papers examined or checked by them, and for errors that would be apparent upon investigation of the personnel or other records available to them.

16. Employes who prepare pay rolls and time vouchers, and bills and accounts receivable in any form, shall be financially responsible for errors in preparation of such papers, due to failure to make the entry thereon correspond with the facts disclosed by time books, time rolls, rate and price authorizations, stock and price cards, and other records and papers in their office, or which may be available to them for comparison and checking; also, for errors in the deliv-

ery of pay receipts, time vouchers, coupon books, meal tickets, and other money values.

Employes required to give bond.

17. The following classes of employes on the Isthmus shall give bond to the United States for the faithful performance of their duties, in such form and in such amount as may be fixed by the Auditor, with the approval of the Governor, and with sureties satisfactory to the Auditor, except the Collector, the Paymaster, and the employes bonded to the Paymaster, and any others who may be required by law or specific instructions to give bond to the United States for the faithful performance of the same duties: (a) All employes of The Panama Canal who collect or disburse moneys of the United States, the Canal Zone, the Panama Railroad Company, or any other moneys by virtue of the offices or positions held by them. (b) Timekeepers who prepare time rolls, pay rolls, time vouchers, or pay receipts. (c) Employes having custody or authority to issue commissary or hotel coupon books, or meal tickets. (d) Storekeepers and others so acting who are the custodians of material and supplies, and property of the United States, the Canal Zone, or the Panama Railroad Company of a value in excess of a minimum amount which is held for issuance to departments. (e) Postmasters and postal clerks.

GEO. W. GOETHALS,
Governor.

EXECUTIVE ORDER OF SEPTEMBER 8, 1911.

ESTABLISHING THE POSTAL SAVINGS SYSTEM IN THE CANAL ZONE.

By virtue of the authority vested in me, I hereby establish the following Order for the Canal Zone:

Section 1. There is hereby established in the post-offices of the Canal Zone a postal savings system, to be operated without the payment of interest on the deposits under such rules and regulations as may be now or hereafter adopted.

Section 2. There is hereby created a Board of Trustees for the control, supervision, and administration of the postal savings depository offices designated and established under the provisions of this Order, and of the funds received as deposits at such postal savings depository offices by vir-

tue thereof. Said board shall consist of the Collector of Revenues of the Canal Zone, the Auditor of the Canal Zone Government, and the Treasurer of the Canal Zone, severally, acting ex officio, and shall have power to make all necessary and proper regulations for the receipt, transmittal, custody, deposit, investment, and repayment of the funds deposited at postal savings depository offices; the regulations above mentioned to be subject to the approval of the Chairman of the Isthmian Canal Commission.

Section 3. Said Board of Trustees is hereby authorized and empowered to designate such post-offices as it may select to be postal savings depository offices, and each and every post-office so designated by order of said Board is hereby declared to be a postal savings depository office within the meaning of this Order and to be authorized and required to receive deposits of funds from the public and to account for and dispose of the same, according to the provisions of this Order and the regulations made in pursuance thereof. Each postal savings depository office shall be kept open for the transaction of business during such hours as the Collector of Revenues shall direct.

Section 4. That accounts may be opened and deposits made in any postal savings depository established under this Order by any person of the age of ten years or over, in his or her own name, and by a married woman in her own name and free from any control or interference by her husband; but no person shall at the same time have more than one postal savings account in his or her own right.

Section 5. At least one dollar, or a larger amount in multiples thereof, must be deposited before an account is opened with a person depositing the same; and one dollar, or multiples thereof, may be deposited after such account has been opened. Postal savings deposits will be evidenced by postal savings certificates issued in fixed denominations of $1, $2, $5, $10, $20, $50, $100, each bearing the name of the depositor, the number of his account the date of issue, and the name of the depository office.

Section 6. Any depositor may withdraw the whole or any part of the funds deposited to his or her credit upon demand, and under such regulations as the Board of Trustees may prescribe.

Section 7. Postal savings funds received under the provisions of this Order shall be deposited with the Treasurer of the Canal Zone under such regulations as the Board of Trustees may prescribe.

Section 8. Postal savings depository funds shall be kept separate from other funds by postmasters and other officers and employees of the postal service, who shall be held to the same accountability under their bonds for such funds as for public moneys; and no person connected with the Post-Office Department shall disclose to any person other than the depositor the amount of any deposits, unless directed so to do by the Collector of Revenues.

Section 9. That the final judgment, order, or decree of any court of competent jurisdiction adjudicating any right or interest in the credit of any sum deposited by any person with the postal savings depository, if the same shall not have been appealed from, and the time for appeal have expired, upon submission to the Collector of Revenues of a copy of the same, duly authenticated in the manner provided by the laws of the United States for the authentication of the records and judicial proceedings of the courts of any state or territory, or of any possession subject to the jurisdiction of the United States, when the same are proved or admitted within any other court within the United States, shall be accepted by the Board of Trustees as conclusive of the title, right, interest, or possession so adjudicated; and any payment of said sum in accordance with such order, judgment, or decree shall operate as a full and complete discharge of the United States and the Canal Zone Government from the claim or demand of any person or persons to the same.

Section 10. This Order shall take effect and be in force sixty days from and after this date.

WM. H. TAFT.

The White House,
September 8, 1911.

[PUBLIC—No. 355—72D CONGRESS]

[H. R. 7514]

AN ACT.

In relation to the Canal Zone postal service.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the postal service of the Canal Zone shall be governed by such of the laws, rules, and regulations of the

Postal Service of the United States as are not inapplicable to the conditions existing in the Canal Zone, and the Governor of the Panama Canal is authorized to establish new post offices or discontinue those already established, to provide such rules and regulations as are necessary for the operation of the service, to appoint the personnel thereof, and to prescribe the postage stamps and other stamped paper which shall be used in such service: *Provided, however,* That the expenses of operating the Canal Zone postal service shall be defrayed, so far as possible, from the revenue derived therefrom, the use of which for that purpose is hereby authorized.

Sec. 2. That deposit money orders issued in the Canal Zone in lieu of postal savings certificates in accordance with rules and regulations heretofore established by the President, or that may hereafter be established by him, shall bear interest at a rate not exceeding 3 per centum per annum.

Sec. 3. That the interest received from the Canal Zone money-order funds deposited in banks under Canal Zone regulations shall be available to pay the interest on deposit money orders authorized by the preceding section. Such interest, which shall form a part of the postal revenues, shall also be available to pay the losses which are chargeable to the Canal Zone postal service.

Sec. 4. That all other laws for the operation of the Canal Zone postal service, excepting section 43a of the Penal Code of the Canal Zone, are hereby repealed.

Approved, February 16, 1933.

HOUSE OF REPRESENTATIVES

72d Congress, 1st Session. Report No. 526.

CANAL ZONE POSTAL SERVICE

February 17, 1932.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. Lea, from the Committee on Interstate and Foreign Commerce, submitted the following

REPORT

[To accompany H. R. 7514]

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H. R. 7514) in relation to the Canal Zone postal service, having considered the same, report thereon with a recommendation that it pass.

The bill has the approval of the President and the Secretary of War, as will appear by the following letter:

War Department,

Washington, January 28, 1932.

Hon. Sam Rayburn,

Chairman Committee on Interstate and Foreign Commerce, House of Representatives.

Dear Mr. Rayburn: The receipt is acknowledged of a letter from the Hon. Clarence F. Lea, dated January 15, 1932, inclosing, and requesting on behalf of your committee a report upon, certain bills for the revision of the laws of the Canal Zone introduced by him, including bill H. R. 7514, entitled "A bill in relation to the Canal Zone postal service."

This is one of the proposals made for the revision of the laws of the Canal Zone recommended by me in letter to the President dated June 5, 1930, and in conformity with the provisions of the act of May 17, 1928 (45 Stat. 596), entitled "An act to revise and codify the laws of the Canal Zone," forwarded by him to the Congress with his message of June 9, 1930. The message and report submitted therewith

were printed as House Document No. 460, Seventy-first Congress, second session. The reasons for recommending the enactment of this bill are given on page 317 of that document.

Various orders and provisions of law relating to the Canal Zone postal system, together with the applicable parts of existing law compared with the proposed amendments and additions, are contained in House Report 2831, Seventy-first Congress, third session, to accompany H. R. 14062.

The early consideration and passage of the legislation proposed for the Canal Zone are recommended,

Sincerely yours,

PATRICK J. HURLEY,
Secretary of War.

During the Seventy-first Congress this matter was referred to the Postmaster General, whose approval was given in the following letter:

Post Office Department,
Washington, D. C., December 13, 1930.

Hon. James S. Parker,

Chairman Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D. C.

My dear Mr. Parker: The receipt is acknowledged of your letter of December 3, submitting for report a copy of H. R. 14082, a bill which would make the laws, rules, and regulations of the United States Postal Service applicable, so far as local conditions permit, to the postal service of the Canal Zone.

There is, of course, no objection to the bill on the part of the Post Office Department, but it seems to me that if there is to be any legislation on this subject at the present time it would be well for the committee to consider the feasibility of the consolidation of the Canal Zone Postal Service with the United States Postal Service. As you know, the Federal Postal Service now extends to Porto Rico, Hawaii, and Alaska, and I am aware of no reason why it should not be similarly extended to the Canal Zone.

Yours very truly,

WALTER F. BROWN.

A general statement relating to the revision and codification of the laws of the Canal Zone is made in the report on H. R. 7519, where the text of the law authorizing such work is quoted. This bill is part of the general revision.

On June 24, 1904, President Taft issued an Executive order establishing a postal service in the Canal Zone, which is as follows:

War Department,

Washington, June 24, 1904.

To the Chairman of the Isthmian Canal Commission:

Sir: The necessities of the inhabitants and the due administration of the affairs of government in the Canal Zone at Panama require the establishment of post offices and postal service in that territory.

It is therefore ordered: That a post office be established in each of the following-named towns of the Canal Zone, to wit: Cristobal, Gatun, Bohio, Gorgona, Bas Obispo, Empire, Culebra, La Boca, and Ancon.

The post offices at Cristobal and Ancon shall be money-order offices.

The Governor of the Canal Zone is hereby authorized to appoint postmasters for the post offices herein established and fix the compensation therefor, subject to the approval of the Isthmian Canal Commission.

The Governor of the Canal Zone is directed to formulate a plan for a practical and efficient postal service in said Canal Zone, and including such measures and provisions of the postal service of the United States as are not inapplicable to the conditions of law and fact existing in the Canal Zone, and to report said plan to the chairman of the Isthmian Canal Commission for such action as the discretion of the commission shall approve.

Pending the establishment of the postal service by act of the commission or other competent authority, the Governor of the Canal Zone is hereby authorized to establish post offices at such additional places in the Canal Zone as in his judgment the interests of the public require, and to appoint postmasters therefor and fix their compensation, subject to the approval or other action thereon by the Isthmian Canal Commission.

The Governor of the Canal Zone is also authorized to adopt and enforce such temporary rules, regulations, provisions, and requirements as may be necessary to secure a practical and efficient postal service in said Canal Zone; and to employ such temporary assistants and employees as the exigencies of the service require.

By direction of the President:

WM. H. TAFT, *Secretary of War.*

Act No. 8 of the Isthmian Canal Commission enacted the second day of September, 1904, provided in detail for the Postal Service on the Canal Zone, and section 42 of that act pertaining to the Postal Service is as follows:

Sec. 42. By Executive order date June 24, 1904, provision was made as follows:

"That a post office be established in each of the following-named towns of the Canal Zone, to wit: Cristobal, Gatun, Bohio, Gorgona, Bas Obispo, Empire, Culebra, La Boca, and Ancon. The post offices at Cristobal and Ancon shall be money-order offices."

The post office at Bas Obispo is discontinued, and post offices are hereby established at San Pablo and Matachin.

There is hereby created and established a postal service for the Canal Zone, Isthmus of Panama.

It shall be the duty of the Postal Service to administer the affairs of the post offices and the postal affairs of the zone.

The Postal Service of the Canal Zone shall be conducted, regulated, and controlled by such of the laws, rules, and regulations of the Postal Service of the United States as are not inapplicable to the conditions of law and fact existing in the Canal Zone, and the laws enacted and the rules and regulations adopted by the Isthmian Canal Commission.

The postmasters of the Canal Zone shall be appointed by the governor, and shall give bond for the faithful performance of the duties of their office in such sum and with such surety or sureties as shall be approved by the governor.

The governor of the zone is hereby authorized to establish new post offices or discontinue those already established at such places and at such times as, in his judgment, the public service requires.

The annual salaries of the postmasters, payable monthly, shall be as follows: San Pablo, ninety dollars; Gatun, ninety dollars; La Boca, one hundred and twenty dollars; Culebra, one hundred and twenty dollars; Empire, one hundred and twenty dollars; Matachin, one hundred and twenty dollars; Bohio, one hundred and twenty dollars; Gorgona, ninety dollars; Cristobal, twelve hundred dollars, and Ancon, nine hundred dollars.

Sec. 43. There is hereby created and established the office of director of posts of the Canal Zone, Isthmus of Panama. The director of posts is charged with direct conduct and control of the affairs of the Postal Service, inspection of post offices, and accounts of postmasters, the approval of requisitions for supplies for post offices and postmasters and the distribution of such supplies.

Postage stamps for the payment of postage in the Canal Zone shall be the postage stamps of the United States, surcharged with the words "Canal Zone, Panama." Requisitions for said stamps shall be drawn by the director of posts, approved by the governor of the zone and delivered to the treasurer of the zone, who shall forward the same to the treasurer of the Isthmian Canal Commission; the stamps, when received, shall be deposited with the treasurer of the Canal Zone for distribution to the postmasters of the zone, who shall make requisition therefor as required by the necessities of their offices and forward such requisitions to the director of posts for his approval, and upon approval by him, the treasurer of the zone is authorized to honor the same.

Sec. 44. All moneys collected or received by the director of posts by virtue of his office shall be deposited forthwith with the treasurer of the Canal Zone, and a receipt in duplicate therefor issued by the treasurer to the director of posts, shall attach the original thereof to his monthly account.

Between the first and fifth day of each calendar month the director of posts shall forward his accounts and the accounts of the Postal Service to the auditor of the Canal Zone for audit.

On September 8, 1911, the President put into effect by Executive order a Postal Savings System on the Canal Zone; that Executive order was repealed by subsequent Executive order bearing date of September 5, 1914, and

provision was made for the deposit of savings in post offices in the Canal Zone and the issuance of money orders therefore for which no fees should be charged. The order of September 5, 1914, was as follows:

To repeal the Executive order of September 8, 1911, establishing the Postal Savings System in the Canal Zone:

By virtue of the authority vested in me, I hereby establish the following order for the Canal Zone:

Section 1. The Executive order of September 8, 1911, establishing the Postal Savings System in the Canal Zone, is hereby repealed: Provided, That accounts opened in accordance with that order, and the regulations established thereunder shall continue as prescribed in said order and regulations until they are finally closed by the withdrawal of the deposits.

Sec. 2. For the accommodation of persons desiring to deposit their savings in the post offices of the Canal Zone, money orders may be issued in the Canal Zone payable to the purchaser at the office of issue, for which no fee shall be charged.

Sec. 3. This order shall take effect from and after October 1, 1914.

WOODROW WILSON.

The White House, September 5, 1914.

By the act of Congress approved August 21, 1916, it was provided that interest should be paid on deposit money orders issued by the Canal Zone post offices at a rate not to exceed 2 per cent per annum.

Sections 5, 6 and 7 of that act are as follows:

That any person who commits any act or who carries on any business, trade, or occupation in the Canal Zone without complying with the rules and regulations established by the President for the levying, assessing, and collecting of taxes, or who violates any rules or regulations for the use of the public roads and highways, or who violates any rules and regulations touching the licensing, taxes, operation, and use of self-propelled vehicles, or who violates any of the police regulations authorized hereunder, shall be punished by fine not to exceed $25 or by imprisonment in jail not to exceed thirty days, or by both such fine and imprisonment, in the court's discretion.

Sec. 6. That deposit money orders issued in the Canal Zone in lieu of postal savings certificates, in accordance with the rules and regulations heretofore established by the President, or that may hereafter be established by him, shall bear interest at a rate not exceeding 2 per centum per annum.

Sec. 7. That the interest received from the Canal Zone money-order funds deposited in banks under Canal Zone regulations shall be available to pay the interest on deposit money orders authorized by the preceding section. Such interest shall also be available to pay any losses which are chargeable to the Canal Zone postal service.

By the act of September 21, 1922, Congress raised the rate of interest to be paid on such deposit money orders from 2 to 3 per cent. Section 6 of that act is as follows:

Sec. 6. That deposit money orders issued in the Canal Zone in lieu of postal savings certificates in accordance with the rules and regulations heretofore established by the President, or that may hereafter be established by him, shall bear interest at a rate not exceeding 3 per centum per annum.

This bill (H. R. 7514) repeals all existing laws of the Canal Zone with reference to the Postal Service and provides new legislation upon that subject. The act retains only so much of the existing law as is considered necessary for the maintenance and operation of the Postal Service under the existing policy. This new act makes the revenues derived from the deposit money order funds a part of the general postal revenues and provides that the expenses of operating the Canal Zone Postal Service shall be defrayed, so far as possible, from the revenues derived therefrom. During the last five years, since the discontinuance of use of the Panama postage stamps, for which a 40 per cent subsidy was paid under the provisions of an agreement entered into by President Taft with the Republic of Panama, the Canal Zone Postal Service has been operating without a deficit, excepting one year when there was a slight loss. The administrative authorities of the zone feel that it is highly desirable to make the Postal Service in the zone self-supporting as far as is possible, so that it will not be necessary to come to Congress for an appropriation to cover deficits in postal operations.

The first paragraph of the bill makes no new provisions with respect to the personnel of the service or the use of postage stamps. It merely continues the present methods which have been in effect for many years.

The applicable parts of existing law, with the parts added and omitted indicated by brackets and italics, as provided in the bill, are inserted herewith and are as follows:

[Matter stricken out and inclosed in brackets and new matter in italic]

That the postal service of the Canal Zone shall be [conducted, regulated, and controlled] *governed* by such of the laws, rules, and regulations of the Postal Service of the United States as are not inapplicable to the conditions [of law and fact] existing in the Canal Zone [and the laws enacted and the rules and regulations adopted by the Isthmian Canal Commission.], *and* the Governor of the [Zone] *Panama Canal* is [hereby] authorized to establish new post offices, or discontinue those already established, [at such places and at such times as, in his judgment, the public service requires,] *to provide such rules and regulations as are necessary for the operation of the service,* [The postmasters of the Canal Zone shall be appointed by the Governor] *to appoint the personnel thereof,* [Postage stamps for the payment of postage in the Canal Zone shall be the postage stamps of the United States, surcharged with the words, "Canal Zone—Panama."] *and to prescribe the postage stamps and other stamped paper which* shall be used *in such service: Provided, however, That the expenses of operating the Canal Zone postal service shall be defrayed, so far as possible, from the revenues derived therefrom, the use of which for that purpose is hereby authorized.*

Sec. 2. That deposit money orders issued in the Canal Zone in lieu of postal savings certificates in accordance with [the] rules and regulations heretofore established by the President or that may hereafter be established by him shall bear interest at a rate not exceeding 3 per centum per annum.

Sec. 3. That the interest received from the Canal Zone money-order funds deposited in banks under Canal Zone regulations shall be available to pay the interest on deposit money orders authorized by the preceding section. Such

interest *which shall form a part of the postal revenues* shall also be available to pay [any] *the* losses which are chargeable to the Canal Zone postal service.

Sec. 4. That all other laws for the operation of the Canal Zone postal service excepting Section 43a of the Penal Code of the Canal Zone are hereby repealed.

(Note.—Section 43a referred to as contained in H. R. 7519 reads as follows:)

"Sec. 43a. The Postal Laws and Regulations of the United States not locally inapplicable which define crimes against the Postal Service and prescribe punishments therefor are hereby extended to the Canal Zone and shall be enforceable in the courts of the Canal Zone in the manner and form prescribed for other criminal cases by the Canal Zone laws."

CERTIFICATE OF TAX-SALE

United States of America,
District of Virginia:

Tax-Sale Certificate

Whereas John Hawxhurst, Gillett T. Watson, and William I. Boreman having been, by virtue of an Act of Congress approved June 7, 1862, entitled "An Act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes" by the President, by and with the advice and consent of the Senate, duly appointed tax commissioners, and thereby constituted a board of three tax commissioners for the insurrectionary districts of the State of Virginia, to wit, so much of the State as was by President of the United States, by his proclamation of July 1, 1862, proclaimed to be in insurrection, and the civil authority of the government of the United States so obstructed that the act of congress approved August 5, 1861, named in the act aforementioned, could not be peaceably executed, said William I. Boreman having resigned, and the President, by and with the advice and consent of the Senate, having, on the 28th day of January, A. D. 1864, appointed A. Lawrence Foster in his stead, the undersigned, composing the board of tax commissioners as now constituted, do hereby certify that the commissioners did, in compliance with the acts of congress aforesaid, on the 15th day of September, 1863, fix the sum of $92.07 as the amount of the tax, by virtue of said Act of August 5th, 1861,

due and payable to the United States, charged upon the following described lot or parcel of land situated in the County of Alexandria, in the said State, to wit: Arlington, on Georgetown road, Northwest from the courthouse nine miles, lately occupied by Robert E. Lee, and bounded as follows: On the north by the land of Ross; east by the Potomac River; south by the land of James Roach, Johnson, and Guy Henry; west by the land of Elliott, Columbus Alexander, and John Tucker, containing eleven hundred acres, be the same more or less, said to have belonged to Mary R. Lee, and charged to her on the land book of the State aforesaid for the year 1860, and valued in said book for $34,100; said sum of $92.07 bearing the same direct proportion to the whole amount of direct tax, namely, $937,550.66 2/3, apportioned to said State by the Act of Congress of August 5, 1861, as the value of said parcel of land was estimated to bear to the whole valuation of the real estate in said State of Virginia subject to said direct tax, according to the last assessment and valuation of said real estate, and the several parcels thereof, made under authority of the said State previous to the first day of January, A. D. 1861, to wit, the assessment and valuation for the year 1860, whereby, in addition to said tax charged upon said parcel of land, a sum of fifty percentum of said tax became charged thereon; and that no owner or owners of said lot or parcel of land did, within sixty days after the commissioners did, on the aforesaid 15th day of September, 1863, so fix said amount, pay the tax thus charged upon the said lot or parcel of land into the Treasury of the United States, or to the commissioners holding said office during said term, or to any such commissioners at any time, by reason of which non-payment said price or parcel of land *became forfeited to the United States;* and, accordingly, the said commissioners caused the same to be advertised for sale, describing in said advertisement the aforesaid parcel of land, and distinctly stating therein said amount of $92.07 as the amount of direct tax assessed on said tract or parcel, in a newspaper published in said County of Alexandria, where said land is situate, namely, in the newspaper called the Virginia State Journal, published in the City of Alexandria, in said County, for four weeks previous to the day of sale; and did further advertise as above by posting notice of said sale in three public places in said County four weeks previous to said day of sale, which day of sale was advertised by said publication and said posting to take place on the

eleventh day of January, A. D. 1864, and thereafter on the said day last named so advertised, and at the place of sale so advertised, to wit, in said City and County of Alexandria, said commissioners did cause the same to be *offered for sale* to the highest bidder who would bid a sum not less than the tax and penalty aforesaid, with lawful costs, and ten per cent per annum interest on said tax then accrued; and no person bidding the same, or a larger sum than the sum hereinafter named, and said tract, lot, and parcel of land having been selected under the direction of the President, in pursuance of an order, of which the following is a copy:

"Whereas, by the Act of 1862, Chapter 98, entitled 'An Act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes,' it was enacted that certain land in said insurrectionary districts should be charged with taxes, and that said land should be sold for nonpayment thereof, as therein provided, and whereas, by the Act of 1863, Chapter 21, approved February 6, said Act of 1862 was amended; and whereas, by virtue of the power in said Acts conferred, 'at any such sale any tracts, parcels, or lots of land which might be selected under the direction of the President for government use, for war, military, naval, revenue, charitable, educational, or police purposes, might at *said sale be bid in* (by the commissioners appointed under the Act), under direction of the President, for and struck off to the United States;'

"And whereas the President, with the advice and consent of the Senate, has, in pursuance of law, appointed John Hawxhurst, William I. Boreman, and G. F. Watson as tax commissioners within and for the State of Virginia; and whereas the real estate hereinafter described, has become charged with taxes to the United States, and by reason of the non-payment thereof, and of the penalty lawfully assessed thereon, *is forfeited to the United States,* and has become liable to be sold under the provisions of the Act aforesaid; and whereas the said estate has been *advertised to be sold for nonpayment of said taxes* and penalties on the 11th day of January, 1864, according to law; and whereas the President of the United States, by virtue of the authority vested in him as aforesaid, has selected for government use, for war, military, charitable, and educational purposes, the land hereinafter described:

"Now, therefore, I, Abraham Lincoln, President of the United States, have ordered and directed, and hereby order and direct, said commissioners *to bid* in and *have struck off to the United States* the following described tract of land, for purposes aforesaid, and in pursuance of the statutes on that behalf provided, namely, the Arlington estate, lately occupied by Robert E. Lee, bounded as follows: North by the land of Ross; east by the Potomac River; south by the land of James Roach, Johnson, and Guy Henry; west by the land of Elliott, Columbus Alexander, and John Tucker; containing eleven hundred acres, be the same more or less."

"ABRAHAM LINCOLN"
"President of the United States".

"Executive Mansion,
Washington, 6th Jan. 1864."

for government use, for war, military, charitable, and educational purposes, *said commissioners did bid in the same to the United States* for the sum of $26,800, being not less than the taxes, penalty and costs, and ten percentum per annum interest on said taxes.

In testimony whereof said commissioners have hereunto affixed their signatures on this 25th day of September, A. D. 1866.

JNO. HAWXHURST
GILLET F. WATSON
A. LAWRENCE FOSTER
U. S. Direct Tax Commissioners of Virginia.

State of Virginia,
Alexandria County, to wit:

Personally appeared before me, a justice of the peace for the State and County aforesaid, John Hawxhurst, Gillet F. Watson, and A. Lawrence Foster, parties signing the above paper, and they severally acknowledged the same to be their act and deed.

Given under my hand this 7th day of March, 1867.

ROBERT BELL, J. P.

Virginia:

Alex. Co. Court Clerk's Office, March 7, 1867.

The foregoing certificate of sale, with the acknowledgment, was this day admitted to record.

Teste: JEFFERSON TACEY, *Clerk.*

WHITE HOUSE,
Washington, D. C., May 9, 1904.

SIR:

* * * * * * * * *

Inasmuch as it is impracticable for the President, with his other public duties, to give to the work of supervising the Commission's construction of the Canal and government of the zone the personal attention which seems proper and necessary, and inasmuch as the War Department is the department which has always supervised the construction of the great civil works for improving the rivers and harbors of the country and the extended military works of public defense, and as the said department has from time to time been charged with the supervision of the government of all the island possessions of the United States, and continues to supervise the government of the Philippine Islands, I direct that all the work of the Commission done by virtue of powers vested in me by the act of Congress approved June 28, 1902, in the digging, construction, and completion of the Canal, and all the governmental power in and over said canal zone and its appurtenant territory, which by virtue of the act of Congress approved April 28, 1904, and these instructions, shall be vested in said Isthmian Canal Commission, shall be carried on or exercised under your supervision and direction as Secretary of War.

Subject to the limitations of law and the conditions herein contained, the Isthmian Canal Commission are authorized and directed:

1. To make all needful rules and regulations for the government of the zone and for the correct administration of the military, civil, and judicial affairs of its possessions until the close of the Fifty-eighth Congress.

2. To establish a civil service for the government of the strip and construction of the Canal, appointments to which shall be secured as nearly as practicable by a merit system.

* * * * * * * * *

6. To make all needful rules and regulations respecting an economical and correct disbursement and an accounting for all funds that may be appropriated by Congress for the construction of the canal, its auxiliary works, and the government of the canal zone; and also to establish a proper and comprehensive system of bookkeeping, showing the state of the work, the expenditures by classes, and the amounts still available.

* * * * * * * * *

The commission may legislate on all rightful subjects of legislation not inconsistent with the laws and treaties of the United States so far as they apply to said zone and other places, and the said power shall include the enactment of the sanitary ordinances of a preventive or curative character to be enforced in the cities of Colon and Panama and which are contemplated and authorized by Article 7 of said Canal Convention. Such legislative power shall also include the power to raise and appropriate revenues in said zone; and all taxes, judicial fines, customs duties, and other revenues levied and collected in said zone by or under the authority of said commission shall be retained, accounted for, and disbursed by said commission for its proper purposes. The members of said commission to the number of four or more shall constitute a legislative quorum, and all rules and regulations passed and enacted by said commission shall have set forth as a caption that they are enacted by the Isthmian Canal Commission "By authority of the President of the United States."

* * * * * * * * *

All laws, rules, and regulations of a governmental character enacted by the commission hereunder shall be submitted to you for your approval, and should your approval be withheld from any such law, rule, or regulation, then from that time the law, rule, or regulation shall thereafter have no force or effect.

* * * * * * * * *

The necessary expenses incurred by the commission in carrying on the government of the canal zone will be defrayed from the local revenues so far as the said revenues may be sufficient and the remainder will be met from the appropriation made by the fifth section of the act of Congress approved June 28, 1902. An estimate of the proposed expenditures and revenues for each year in carrying on the government of the zone will be submitted to Congress at the beginning of each annual session.

* * * * * * * * *

These instructions may be modified and supplemented as occasion shall arise.

Very respectfully,

THEODORE ROOSEVELT.

Hon. WILLIAM H. TAFT,
Secretary of War.

Office - Supreme Court
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 5.

HARRY H. WOODRING, Secretary of War, and H. A. A. SMITH, General Purchasing Officer and Chief of Washington Office, Panama Canal, *Petitioners,*

v.

JUSTUS S. WARDELL, Receiver, District National Bank of Washington, D. C., *Respondent.*

PETITION FOR REHEARING.

BRICE CLAGETT,
CHARLES E. WAINWRIGHT,
Attorneys for
Justus S. Wardell, Receiver.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR REHEARING.

Comes now Justus S. Wardell, as Receiver of the District National Bank, Washington, D. C., respondent in the above-captioned cause, by his attorneys, and submits his petition for rehearing of the above-entitled cause, and in support thereof respectfully shows:

The majority opinion in cause numbered 6, Inland Waterways Corporation, et al., petitioners, v. Frederick J. Young, Receiver of the Commercial National Bank of Washington, D. C., respondent, which is followed and adopted in cause numbered 5, reasons, as we construe the opinion, that inas-

much as a public policy and practice of securing "public money" of the United States, had, as a "practical response to disastrous experience", developed prior to the enactment of the National Bank Act of June 3, 1864, 13 Stat. 99, including Section 45 thereof (12 U. S. C. Section 90), such policy and practice must be considered as having been perpetuated in the subsequently enacted National Bank Act, not by specific provision therein, but nevertheless as implicitly therein vesting such power in the banks, as financial agents of the United States, in order that they might be utilized by the Government in protecting its funds. In summarizing the pertinent historical developments prior to the enactment of the National Bank Act, the majority opinion states:

> "Congress has necessarily been concerned from the beginning to provide appropriate safeguards for government funds. One of the motives in the establishment of the first Bank of the United States was its availability as a safe depositary for such funds. They were kept there until the expiration of that Bank's charter in 1811. Thereafter and until the second Bank of the United States was chartered, government monies were kept in state banks. These deposits were without security, and as a consequence severe losses followed the financial dislocation which came with the War of 1812. This experience led the Government to exact security, and losses became negligible. Philipps, Methods of Keeping the Public Monies of the United States, pp. 6-20; H. Rep. No. 358, 21 Cong., 1st Sess., Vol. 3, p. 12; IV McMaster, History of the People of the United States, p. 295 *et seq.;* III American State Papers, Finance, p. 11. The second Bank of the United States, established partly to serve as a Government depositary, kept most of the federal funds until their withdrawal in 1833 by Secretary Taney. But as a condition to their deposit in various state banks after 1833, Taney, acting upon the earlier experience of the Treasury under Secretaries Gallatin and Crawford, exacted appropriate security.[3] By the Act of June 23, 1836, 5 Stat. 52, Congress translated Treasury practice into

legislative policy. It thereby became the Secretary's duty, whenever wisdom dictated, to require collateral for Government funds. As a result security was demanded of almost all the depositaries. Phillips, *op cit.*, p. 63. The panic of 1837 brought another modification. Government monies were held by the local collectors and by the Treasury itself, and a little later deposited in the new Sub-Treasury. But in 1841 the old method of deposit in state banks was resumed under the practice which had been introduced in 1833. Exec. Doc. No. 123, 27th Cong., 2nd Sess., p. 2; Phillips, *op cit.*, p. 113. This arrangement—that is, deposits secured by collateral—continued until the Sub-Treasury Act of 1846, 9 Stat. 59, led to the withdrawal of Government funds from private banks. The sub-treasury system persisted until the establishment of the modern national banking system."

The foregoing summary indicates, chronologically, these successive developments:

(a) A policy of requiring security from banks, prior to the Act of June 23, 1836, without the sanction of express Congressional enactments.

(b) The enactment of the Act of June 23, 1836, 5 Stat. 52, wherein "Congress translated Treasury practice into legislative policy."

(c) Discontinuance for the time being of deposits of public moneys in the banks, and retention of them by the collectors and by the Treasury itself, in consequence of the panic of 1837.

(d) Resumption, in 1841, of deposits of public moneys in the state banks, secured by collateral.

(e) Passage of the Sub-Treasury Act of 1846, 9 Stat. 59, resulting in the withdrawal of government funds from private banks and the deposit and retention of said moneys in the sub-treasury from that time thenceforth to the establishment of the National Banking System in 1864.

(f) Enactment of Section 45 of the National Bank Act authorizing the deposit of public moneys of the government in national banks under the restrictions and requirements therein specified and when said banks had been designated as depositaries of public money by the Secretary of the Treasury.

In view of the foregoing developments, may not the conclusion of the majority opinion be fairly open to question and justify reconsideration? For approximately 18 years prior to the enactment of the National Bank Act in 1864, the government's money had not been deposited in banks at all, but in the sub-treasuries. Therefore, when the National Bank Act was passed, there existed no policy or practice of depositing government money in banks.

Furthermore, it was the invariable practice prior to 1864 to have the selection of government depositaries made by the Secretary of Treasury[1] and to have the Secretary of the Treasury control the distribution of the public money of the United States and to exact security for deposits when security was required. There was never any practice of having miscellaneous officers of the government perform this function. It was Hamilton, Secretary of the Treasury, who began depositing public money of the United States in the first Bank of the United States,[2] and it was he likewise who placed some money in state banks as depositaries.[3] After the closing of the first Bank of the United States, it was the Secretary of the Treasury Gallatin who issued a circular designating certain banks as depositaries of United States money.[4] Under the Act of April 10, 1816,

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[1] The only exception was under the Act of 1809, when Congress passed a law requiring disbursing officers to keep the public moneys in some incorporated bank designated by the President of the United States. Phillips, Methods of Keeping the Public Money of the United States, p. 6.

[2] Phillips, Op cit., p. 4.

[3] Phillips, Op cit., pp. 5, 9.

[4] Phillips, Op cit., p. 15.

creating the second Bank of the United States, specific provision was made for depositing public money in the Bank unless the Secretary of the Treasury should order the public money deposited elsewhere.[5] In 1817, state banks approved by the Secretary of the Treasury were named as depositaries of the public money and the Secretary addressed a circular to them regulating the management of such money.[6] When public money was again deposited in state banks after 1833, and security for such deposits exacted, the depositaries were designated and the security required by Secretary of the Treasury Taney.[7] In making his recommendations to Congress in 1834, for the continued deposit of public money in state banks, Secretary Taney proposed that the banks were to be designated by the Secretary and the Secretary was to be authorized to demand security.[8] Under the Act of June 23, 1836, the Secretary of the Treasury was to select state banks as depositaries of the public money, the banks selected were to furnish the Secretary with statements of condition and permit examinations of condition and the Secretary might require collateral security.[9] By the Act of June 23, 1836, discretion in selecting banks was for the first time taken away from the Secretary of the Treasury, and Congress provided that the public money should be deposited in state banks in proportion to the representation of the states in Congress.[10] It was this departure from the practice of having the Secretary of the Treasury manage the distribution of the public money, which was one of the chief causes of the panic of 1837.[11] After August 13, 1841,

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[5] Phillips, Op cit., p. 26.
[6] Phillips, Op cit., pp. 30, 31, 32.
[7] Phillips, Op cit., p. 54.
[8] Phillips, Op cit., p. 56.
[9] Phillips, Op cit., pp. 59, 60, 61.
[10] Phillips, Op cit., pp. 74, 75, 76, 77, 78, 79.
[11] Phillips, Op. cit., pp. 80-98.

when the law of June 23, 1836, was repealed,[12] and the Independent Treasury Law was also repealed, it was the Secretary of the Treasury again who designated bank depositaries for the public money of the United States and it was the Secretary of the Treasury who required the giving of collateral security.[13] Thereafter, came the Act of August 6, 1846, (the Sub-Treasury Act) followed by the National Bank Act in 1864.

It is undoubtedly true, therefore, that in enacting the National Bank Act in 1864, Congress deliberately legislated with the previous financial history of the government in mind. That is why, as we view the matter, it may be considered that the National Bank Act constitutes by itself a complete system for the establishment and government of national banks[14] designed not only to safeguard the public money of the United States by having such public money deposited in banks selected by the Secretary of the Treasury, but also to have such banks, under the regulations of the Secretary, act as financial agents of the government, as well as to make banks of such soundness as to invite their use by the people of the United States, and to be capable, in case of disaster, of assuring private depositors equality of treatment with all other depositors other than those, such as the Secretary of the Treasury, to whom Congress specifically has authorized a priority or secured status.

In particular, Congress did not leave the matter of securing public money to be inferred from the general powers of the national banks. The Act is not silent in that regard. The history prior to 1864 taught that disaster or inconvenience followed every system of safeguarding the public money of the United States which did not concentrate in the hands of the Secretary of the Treasury the management of government finances and authorize him and him alone to

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[12] Phillips, Op cit., pp. 111, 112.

[13] Phillips, Op cit., pp. 112, 113.

[14] *Cook County National Bank* v. *U. S.*, 107 U. S. 445.

select depositaries of public money and exact security therefor. Hence, Section 45 embodied precisely the entire experience of the government in handling public money prior to the enactment of the National Bank Act. Thus the securing of deposits of government funds found desirable by the history of government laws and practice prior to 1864 was accomplished by the direct language used in Section 45 wherein Congress gave the Secretary of the Treasury the right to secure such public funds and left to the Secretary of the Treasury's discretion the extent to which he should deposit any public money in national banks; what national banks should be designated as depositaries of public money; the amount of public money which should be placed in any particular national bank; and the extent and character of the security that should be taken for such deposits as were made in national banks.

We respectfully submit that had Congress intended, by the enactment of the National Bank Act, and particularly by Section 45, thereof, that any government officer or agency could make deposits in national banks and that national banks should have the broad powers to pledge their assets to the practically unlimited degree and extent inferentially indicated by the majority opinion, such intent would have been expressly and unmistakably manifested in the drafting of Section 45.

Is it not appropriate to believe that, since Congress was not silent on this subject, but made careful provision for securing deposits of "public money" in banks selected by the Secretary of the Treasury, Congress thereby covered the field and intended that deposits of funds other than "public money" of the United States made by agents of the United States other than the Secretary of the Treasury, should be treated just as private deposits were treated?

Furthermore, assuming for discussion that Congress did not, in 1864, visualize or have in contemplation, the manifold developments and forms of future governmental activities, is it not significant that when, from time to time, specific and additional governmental activities through corpo-

rate or other agencies of the government were brought to the attention of Congress, that body saw fit to provide authority in national banks to pledge their assets as security for the deposits of such agencies only in the specific instances expressly indicated, (some of which are enumerated in the majority opinion in the instant case, and others of which are enumerated in note 11 of the opinion in *Texas and Pacific Railway Co.* v. *Pottorff* (1934) 291 U. S. 245, at page 257), and yet such authority was not expressly provided by Congress with reference to the government agencies involved in the instant suit, either at the time of the creation of such agencies by Congress, or by special enactment? In other words, does not the fact that Congress saw fit to provide authority for the pledge of assets of national banks to secure the deposits of certain governmental agencies, indicate a lack of intent that such security should be given to other governmental agencies concerning which such provision had not been made?

That Congress, in setting up such agencies as the Emergency Fleet Corporation, the Inland Waterways Corporation, and various other agencies outside of the "regular" government establishment, intended that such agencies should be dealt with as private rather than government agencies, was clearly established by this Court in *Keifer & Keifer* v. *R. F. C.* (1939) 306 U. S. 381, and again in *Federal Housing Administration* v. *Ruth Burr*, No. 354, October Term 1939, decided February 12, 1940. Why, if Congress intended that such agencies should not have the historical governmental immunity from suit, did not Congress also intend that the money of such agencies, when deposited in banks, should be treated like ordinary deposits rather than as public money? Does not the entire theory of historical development, coupled with the fact that Congress in the National Bank Act made specific provision for safeguarding "public money" of the United States, lead to the conclusion that where deposits did not fall within the category spelled out in Section 45, Congress did not intend that such deposits should be secured unless it passed a special Act for that purpose? Is it not especially significant that

the funds involved in the companion case, Number 6, are deposits of two government corporations, the Inland Waterways Corporation and the Emergency Fleet Corporation, which do not enjoy governmental immunity from suit, and that the funds involved herein are money order deposits from the Panama Canal Zone, which generally have not been dealt with by Congress, as "regular" government funds?

Shortly after the decisions of this Court in *Texas & Pacific Ry. Co.* v. *Pottorff* (1934) 291 U. S. 245, and *Marion* v. *Sneeden* (1934) 291 U. S. 262, the Secretary of the Treasury sent identical letters to the President of the Senate and the Speaker of the House, saying that these two decisions created "urgent necessity" for the prompt enactment of an amendment to Section 45 of the National Bank Act, which should eliminate doubt as to the power of national banks to give security for funds such as those involved in the present case. (Appendix, p. 14.)

A proposed amendment was attached to the letters. (Appendix, p. 16.) The Secretary's request undoubtedly had the attention of Congress. Besides being formally laid before both Houses ((1934) 78 Congressional Record, 7596, 7726), and printed as a Senate document (No. 175, 73d Cong., 2d Sess.) it was presented to the Senate in session (78 Cong. Rec. 11466), and a bill (S. 3558, 73d Cong., 2d Sess.) embodying the amendment was introduced and referred to committee (78 Cong. Rec., 8154). Later in the session, when the Senate was considering a banking bill (S. 3748) which contained nothing on the question of securing deposits, an amendment was proposed from the floor, to extend somewhat the power of national banks to secure deposits of states and their subdivisions, along lines proposed in the Secretary's letter. The Senator in charge of the bill accepted the amendment but apparently only because it improved the competitive position of national banks against state banks, saying that "the committee is opposed to the general principle of public deposits having any security and to giving them a preference over the deposits of the ordinary depositor." (78 Cong. Rec. 12058.) The entire bill

failed of passage. When it was in effect reintroduced in the next session (H. R. 7617), becoming the Banking Act of 1935, which amended the National Bank Act in many particulars, even the aforesaid amendment which had previously been adopted by the Senate was omitted.*

Is it not significant that Congress failed to enact the legislation thus recommended by the Secretary of the Treasury and may not such failure reasonably be construed as indication of a legislative policy not to broaden and increase the power of national banks to pledge their assets to cover deposits of Governmental agencies of the type involved in the instant case?

The legislative policy on the part of Congress to protect private depositors in national banks and to insure a ratable distribution of the assets of such banks when in receivership, even at the expense of the United States, was early considered by this Court in *Cook County National Bank* v. *United States* (1883) 107 U. S. 445, 448, 449, wherein this Court held that inasmuch as the National Bank Act constituted a complete system for the establishment and government of national banks, not only with reference to their organization and operation, but also as controlling the winding up of such institutions and the distribution of their assets, the United States was not entitled to any preference or priority over the general common creditors of the national banks, in view of the absence of specific statutory provisions in the National Bank Act permitting such preference or priority. The pledging of assets by way of security is merely another form of granting preferential treatment to the Government. The reasoning in that case which leads to the conclusion that the United States must be denied preferential or priority status over other creditors because such right was not expressly provided for in the

*When in 1938, Congress expressly gave national banks power to pledge for bankruptcy deposits, Sec. 61 of the Bankruptcy Act of 1938, 52 Stat. 872 (U. S. C., title 11, sec. 101), it but accorded with the suggestions of this Court. See letter from the Chief Justice to the Attorney General, dated May 25, 1937.

National Bank Act would seem to require by analogous reasoning, the conclusion that neither the United States nor its agencies can acquire preferential or priority status from national banks by pledges of assets to secure their deposits, unless specific provisions to that effect are contained within the National Bank Act or the amendments thereto.

The policy of Congress to protect the deposits of private citizens in national banks is also shown by the enactment of the Banking Act of 1935, *supra*, which not only re-appropriated a large sum of public money for non-dividend paying stock of the Federal Deposit Insurance Corporation, and directed that a greater sum be advanced by the Reconstruction Finance Corporation or the Treasury, whenever needed to meet the Corporation's insurance obligations, but gave the Secretary of the Treasury power to make further advances in his discretion, limited only by the amount of obligations the Corporation may issue. Sec. 101, 49 Stat. 686, 699, amending sec. 3 of the Act of June 16, 1934, 48 Stat. 971; and sec. 8 of the Banking Act of 1933, 48 Stat. 168, 177. (U. S. C., title 12, sec. 264(d) (o); see title 15, sec. 606(a); see (1935) Rep. Fed. Dep. Ins. Corp. 10, (1936) *Id.*, 34, 36. In so legislating, Congress was not unappreciative of the question of pledging. Sec. 11(d) of the Banking Act of 1933, 48 Stat. 182 (U. S. C., title 39, sec. 759); secs. 339, 340 of the Banking Act of 1935, 49 Stat. 721 (U. S. C., title 12, sec. 192; title 11, sec. 101); *cf.* Act of June 24, 1938, 52 Stat. 1037. (U. S. C., title 25, sec. 162(a)). Such provision of funds at the public risk recognizes in effect that the Government is no longer obliged to look solely to its own economic safety in times of stress, but may partly devote its now great credit and sources of revenue to the assistance of particularly distressed citizens. Respecting banking, pledges to Government agencies tend to destroy on the one hand what is fostered on the other.

The doctrine established by the majority opinion, to the effect that implied power exists in national banks to pledge their assets to secure all deposits of monies of federal agencies, even though such deposits do not comprise public

monies of the United States within the purview of Section 45, is so sweeping in scope and so far-reaching in effect, that it is earnestly felt by petitioner that the interests of the common or general depositors of national banks, not only in the closed bank involved in the litigation in the instant case, but in national banks throughout the country, can well justify affording an opportunity for these aspects of the matter to be examined anew and presented in reargument before the issues shall be finally settled.

Respectfully submitted,

BRICE CLAGETT,
CHARLES E. WAINWRIGHT,
Attorneys for
Justus S. Wardell, Receiver.

I hereby certify that this application is presented in good faith and not for delay.

BRICE CLAGETT,
Counsel.

APPENDIX.

73D CONGRESS, 2d Session } SENATE { DOCUMENT No. 175

Security of National Banks for Deposits of Public Moneys

Letter From

THE SECRETARY OF THE TREASURY

Transmitting

A Draft of a Bill to Amend Section 5153 of the Revised Statutes, Designed to Clarify the Situation With Respect to the Giving of Security by National Banks for Deposits of Public Moneys

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April 26 (calendar day, April 28), 1934.—Referred to the Committee on Banking and Currency and ordered to be printed

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APRIL 27, 1934.

MY DEAR MR. PRESIDENT: I have the honor to forward herewith a draft of a bill to amend section 5153 of the Revised Statutes, designed to clarify the situation with respect to the giving of security by national banks for deposits of public moneys.

This matter has been the subject of an exhaustive study, and the enactment of the proposed legislation is recommended by the Comptroller of the Currency. I am forwarding herewith a copy of excerpts from a memorandum forwarded to me by him.

If you deem it advisable, it will be appreciated if these proposals can be submitted for consideration through the appropriate channels.

Respectfully yours,

H. MORGENTHAU, JR.,
Secretary of the Treasury.

Hon. JOHN N. GARNER,
President United States Senate.

Attached hereto is text of proposed amendment to section 5153 of the Revised Statutes, as amended (U. S. C., title 12, sec. 90), which amendment relates to the designation of depositaries of public money by the Secretary of the Treasury and the giving of security by national banking associations for deposits of public money of the United States and for various other types of deposits made by public officials, consisting of money for which they are accountable under the law by virtue of their official capacity. The essential respects in which this amendment changes the present law is in that it eliminates doubt under recent decisions as to the power of national banks to give security for the protection of deposits of public money belonging to various Government agencies or of money deposited thereby where they are accountable for such money by reason of the official capacity in which held.

The amendment operates with similar effect as to deposits by officers, agents, or employees of the States, Territories, or insular possessions or any public instrumentality or agency thereof, where the depositing official is charged with the custody of and is accountable for such money by virtue of his official position. Provision is made that security heretofore given for the various types of deposits referred to shall be deemed validly given except where heretofore determined to be in violation of the act of June 25, 1930.

There is urgent necessity for the prompt enactment of this legislation, due to recent decisions of the Supreme Court of the United States, particularly two decisions rendered February 5, 1934, in *City of Marion, Illinois,* v. *Sneeden, Receiver,* and *Texas and Pacific Railway Company* v. *Pottorff, Receiver,* in which the Court took the position that national banks have no implied power to give security for deposits of public money, notwithstanding the fact that for more than 60 years national banks have been giving such security with the approval of the Comptroller of the Currency, in conformance to the views expressed by the Attorney General of the United States (in 30 Ops. Atty. Gen. 341), to the effect that the section being amended "is more reasonably construed as a recognition of the existence of the power on the part of national banks to give security for deposits than as a grant by implication or authority to give security for Government deposits alone." A large number of national banks have been placed in the

hands of receivers in the past 3 years. Almost all of these banks held deposits of public money for which security had been pledged. Millions of dollars in such deposits belonging to the Philippine Islands, the United States Shipping Board, Emergency Fleet Corporation, United States Housing Corporation, and similar entities were on deposit in these banks under a contract, whereby the bank had pledged collateral security therefor. These pledges were considered valid by this office and these agencies permitted to avoid loss of such deposits through realization upon the collateral held. Unless curative legislation is enacted to cover this situation, it may be the duty of this office as a matter of law to require these various agencies to restore these funds to the receivers of the various banks in which they were on deposit. Creditors of some of the banks are insisting upon such action being taken at this time. If such restoration must be made, then in most cases a substantial loss will be suffered by the depositing unit, which loss will in many instances ultimately fall upon the Treasury. The situation is also urgent from the standpoint of the going national bank, inasmuch as the various depositing units are now on notice as to the possible lack of power in the banks to give security for their deposits, with the result that these banks are threatened with the withdrawal of hundreds of millions of dollars, which no doubt will be deposited in State banks which do under the State law possess power to give collateral security therefor.

The same situation exists with respect to deposits of funds by the States and their various agencies. Generally speaking, there has been a preference given national banks by the depositing officials thereof. The State treasurer of Illinois within the past 10 days has indicated he feels that he must withdraw approximately $54,000,000 from national banks in Illinois, $26,000,000 of which is in two Chicago banks. The legal representatives of various drainage and irrigation districts in California have indicated that unless the law is clarified, they must withdraw some $50,000,000 from national banks in California. When one considers the total amount of such deposits in national banks all over the United States which may thus be suddenly withdrawn, and the consequent forced liquidation of assets which may be required of such banks in order to meet such withdrawals with resulting ill effect upon market conditions, it becomes imperative to avoid such result by having appro-

priate legislation promptly enacted eliminating the difficulty.

I accordingly recommend that appropriate action be taken to have this amendment enacted into law.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 5153 of the Revised Statutes, as amended (U. S. C., title 12, sec. 90; U. S. C., supp. VII, title 12, sec. 90), is amended to read as follows:

"SEC. 5153 (a). All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safe keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: *Provided,* That the Secretary shall, on or before the 1st of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: *Provided,* That the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections. Notwithstanding the extent if any, to which the same may not heretofore have been applicable thereto, the provisions of this paragraph, of section 3621 of the Revised Statutes, as amended (U. S. C., title 31, sec. 495), and of the thirteenth paragraph of section 9 of the Federal Reserve Act, as amended (U. S. C., supp., VII, title 12, sec. 332), shall apply to any and all money held by any instrumentality or agency of the United States, or by any officer, employee, or agent of the United States, or of any such instrumentality or agency, in his official capacity, and shall, to the extent designated by the Secretary of the Treasury apply to any money held by any corporation in which, or in the funds of which, the United States has an interest, or by any officer, employee, or agent of any such corporation, in his official capacity. Nothing in this paragraph shall be construed to affect any powers conferred by section 17 of the Act of March 3, 1911 (U. S. C., title 25, sec. 156), section 28 of the Act of May 25, 1918 (U. S. C., title 25, sec. 162), section 1 of the Act of August 24, 1912, as amended (U. S. C., title 39, sec. 759), section 61 of the Act of July 1, 1898, as amended (U. S. C., title 11, sec. 101), section 3 of the Act of March 3, 1933 (U. S. C., supp. VII, title 11, sec. 101a), and section 5234 of the Revised Statutes, as amended (U. S. C., title 12, sec. 192).

"(b) Any association, upon the deposit with it of any money by any State, or by any political subdivision of any State, or by any officer, employee, or agent of any such State or subdivision, in his official capacity, may give security for the safe keeping and prompt payment of the money so deposited; and, upon such deposit by any public instrumentality or agency of one or more States, or of one or more political subdivisions of any State, or by any officer, employee, or agent of any such instrumentality or agency, in his official capacity, may, with the consent of the Comptroller of the Currency, give such security; but no security shall be given under this paragraph with respect to any deposit if, under the statute law of the State in which such association is located, the giving of security for such deposit by other

banking institutions in such State is prohibited. As used in this paragraph the term "State" means any State, territory, District, or possession (including the Philippine Islands) of the United States.

"(e) All security for any deposits described in this section heretofore given by any association shall be deemed to have been validly given except where the enforcement of such security has been denied by the Comptroller of the Currency as in violation of the second paragraph of this section (U. S. C., supp. VII, title 12, sec. 90), as in force after June 25, 1930, and prior to the enactment of this paragraph, and no such security, enforcement of which was so denied, shall be deemed to have been validly given."

SUPREME COURT OF THE UNITED STATES.

No. 5.—October Term, 1939.

Harry H. Woodring, Secretary of War, and H. A. A. Smith, General Purchasing Officer and Chief of Washington Office, Panama Canal, Petitioners,
vs.
Justus S. Wardell, Receiver, District National Bank of Washington, D. C.

On Writ of Certiorari to the Court of Appeals for the District of Columbia.

[March 25, 1940.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This is a companion case to *Inland Waterways Corporation* v. *Young*, No. 6, decided this day. The District National Bank pledged some of its assets to secure deposits made by the Secretary of War on behalf of the Panama Canal Zone. The Bank became insolvent in 1933, and the pledged assets were sold. Respondent, the Bank's receiver, brought this action to recover that part of the proceeds which represented an amount in excess of dividends paid to the ordinary depositors. The District Court held that the pledges were *ultra vires* and gave judgment for the respondent. The Court of Appeals affirmed. 100 F. (2d) 690.

For the reasons stated in *Inland Waterways Corporation* v. *Young*, *ante*, we are of opinion that the pledges given by the Bank were valid, and that the judgment below should be

Reversed.

The Chief Justice, Mr. Justice McReynolds and Mr. Justice Roberts, for the reasons set forth in their dissenting opinion in *Inland Waterways Corp.* v. *Young*, No. 6 *ante*, dissent here.

Mr. Justice Reed and Mr. Justice Murphy took no part in the disposition of this case.